IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. ~~1220~~ 150

THE ASSOCIATED PRESS,
Petitioner,

—against—

EDWIN A. WALKER,
Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS, OR, IN THE ALTERNATIVE, TO THE SUPREME COURT OF TEXAS

WILLIAM P. ROGERS
LEO P. LARKIN, JR.
STANLEY GODOFSKY
200 Park Avenue
New York, New York 10017

ARTHUR MOYNIHAN
50 Rockefeller Plaza
New York, New York 10020

J. A. GOOCH
SLOAN B. BLAIR
1800 First National Building
Fort Worth, Texas 76102

Attorneys for Petitioner
The Associated Press

TABLE OF CONTENTS

APPENDIX A

Constitutional Provisions and Statutes Involved

U. S. Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Constitution, Amendment XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Vernon's Texas Civil Statutes, Article 5431

In any action for libel, in determining the extent and source of actual damage and in mitigation of exemplary or punitive damage, the defendant may give in evidence, if specially pleaded, all material facts and circumstances surrounding such claim of damage and the defense thereto, and also all facts and circumstances under which the libelous publication was made, and any public apology, correction or retraction made and published by him of the libel complained of, and may also give in evidence, if specially pleaded in

mitigation of exemplary or punitive damage, the intention with which the libelous publication was made. The truth of the statement, or statements, in such publication shall be a defense to such action.

Vernon's Texas Civil Statutes, Article 5432, Subsections 4 and 5

The publication of the following matters by any newspaper or periodical shall be deemed privileged and shall not be made the basis of any action for libel.

* * *

4. A reasonable and fair comment or criticism of the official acts of public officials and of other matters of public concern published for general information.

5. The privilege provided under Sections 1, 2, 3, and 4, of this article shall extend to any first publication of such privileged matter by any newspaper or periodical, and to subsequent publications thereof by it when published as a matter of public concern for general information; but any re-publication of such privileged matter, after the same has ceased to be a matter of such public concern, shall not be deemed privileged, and may be made the basis of an action for libel upon proof that such matter had ceased to be of such public concern and that same was published with actual malice.

APPENDIX B

Opinions of the Courts Below

Opinion of the Texas Court of Civil Appeals

IN THE

Court of Civil Appeals

FOR THE
SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

No. 16624

THE ASSOCIATED PRESS,
Appellant,

vs.

EDWIN A. WALKER,
Appellee.

FROM THE DISTRICT COURT OF TARRANT COUNTY

OPINION

This is a libel suit. The parties will be designated as they were in the court below or The Associated Press as the A. P. and Walker by name.

The following are the reports of which Walker complained:

"October 2, 1962 'Walker, who Sunday night led a charge of students against federal marshals on the Ole

Appendix B
Opinion of the Texas Court of Civil Appeals

Miss Campus, was arrested on four counts including insurrection against the United States.'

"October 3, 1962 (Editors Note: Former Maj. Gen. Edwin A. Walker, a key figure in the week-end battling over admission of a Negro to the University of Mississippi, was eating dinner Sunday night when he says he was told there was a 'scene of considerable disturbance' on the University of Mississippi Campus. He went there. Here is the story of Van Savell, 21, Associated Press newsman, who was on the scene and saw what happened.)

"By Van Savell: Oxford, Miss., October 3, 1962 (AP) 'Utilizing my youth to the fullest extent, I dressed as any college student would and easily milled among the several thousand rioters on the University of Mississippi Campus Sunday night.'

" 'This allowed me to follow the crowd—a few students and many outsiders—as they charged federal marshals surrounding the century old Lyceum Building. It also brought me into direct contact with former Army Maj. Gen. Edwin A. Walker, who is now under arrest on charges of inciting insurrection and seditious conspiracy.

" 'Walker first appeared in the riot area at 8:45 p.m., Sunday near the University Avenue entrance about 300 yds. from the Ole Miss administration Building.

" 'He was nattily dressed in a black suit, tie and shoes and wore a light tan hat.

" 'The crowd welcomed Walker, although this was the man who commanded the 101st Airborne Division during the 1957 school integration riots at Little Rock, Arkansas.

" 'One unidentified man queried Walker as he approached the group. "General, will you lead us to the steps?"

Appendix B
Opinion of the Texas Court of Civil Appeals

" 'I observed Walker as he loosened his tie and shirt and nodded "Yes" without speaking. He then conferred with a group of about 15 persons who appeared to be the riot leaders.

" 'The crowd took full advantage of the near-by construction work. They broke new bricks into several pieces, took survey sticks and broken soft drink bottles.

" 'Walker assumed command of the crowd, which I estimated at 1,000 but was delayed for several minutes when a neatly dressed, portly man of about 45 approached the group. He conferred with Walker for several minutes and then joined a group near the front.

" 'Two men took Walker by the arms and they headed for the Lyceum and the federal marshals. Throughout this time, I was less than six feet from Walker.

" 'This march toward tear gas and some 200 marshals was more effective than the previous attempts. Although Walker was unarmed, the crowd said this was the moral support they needed.

" 'We were met with a heavy barrage of tear gas about 75 yards from the Lyceum steps and went a few feet further when we had to turn back.

" 'Before doing so, many of the rioters hurled their weapons—the bricks, the bottles, rocks and wooden stakes —toward the clustered marshals.

" 'We fled the tear gas and the charging marshals—the crowd racing back to a Confederate soldier's statue near the grove entrance below the Lyceum.

" 'I went to a telephone. A few minutes later I returned and found Walker talking with several students. Shortly thereafter, Walker climbed halfway up the Confederate monument and addressed the crowd.

Appendix B
Opinion of the Texas Court of Civil Appeals

" 'I heard Walker say that Gov. Barnett had betrayed the People of Mississippi. "But don't let up now," he said, "You may lose this battle, but you will have been heard."

" 'He continued: "This is a dangerous situation. You must be prepared for possible death. If you are not, go home now."

" 'There were cheers. It was apparent that Walker had complete command over the group.

" 'By this time, it was nearly 11:00 p. m. and I raced to the telephone again. Upon my return, Walker was calmly explaining the "New Frontier Government" to several bystanders. He remained away from the rioting throughout the next few hours, but advised on several tactics.

" 'One Ole Miss student queried the former General, "What can we use to make the tear gas bombs ineffective? Do you know of any way that we can attack and do some damage to those damn Marshals?"

" 'Walker suggested the use of sand to snuff out the tear gas.

" ' "This stuff works real well, but where can you get it?", he asked.

" 'At this time the rioters were using a University fire truck and fire extinguishers in an attempt to make the tear gas bombs ineffective.

" 'I left Walker and walked about 100 yards away where Molotov cocktails—gasoline, in bottles with a fuse—were being made.

" 'Again I left the area for a telephone. As I walked toward a Dormitory with George Bartsch of the Little Rock Associated Press Bureau, we were attacked by Marshals who mistook us for students. We were deluged

by tear gas, manhandled, handcuffed and beaten with clubs during a 200 yard walk back to the Lyceum Building.

" 'Thanks to recognition from Chief Marshal James P. McShane, we were quickly released and given freedom in the Marshals' Headquarters.

" 'Within minutes rifle and shotgun fire erupted from the rioting crowd and two men—one a French newsman—were killed. We considered ourselves lucky to have been arrested and glad to be behind closed, heavily guarded doors.' "

The only two statements of the above quoted reports which were complained of by Walker as being libelous and which form the basis of special issues submitted by the Court were: (1) "Walker, who Sunday led a charge of students against federal marshals on the Ole Miss Campus" (October 2, 1962 report), and (2) "Walker assumed command of the crowd" (October 3, 1962 report). For the sake of brevity these two statements will hereinafter be referred to as the "charge" and "command" statements respectively.

In answer to special issues one through four, the jury found that the "charge" statement was not "substantially true", did not constitute fair comment, was not made in good faith and was actuated by malice. It found to the same effect in response to similar issues five through eight concerning the "command" statement.

In answer to issue No. 9 the jury found damages in the sum of $500,000.00 and having found that A. P. was actuated by malice in answer to special issues Nos. four and eight the jury, in response to special issues Nos. ten and eleven found that exemplary damages should be awarded and in the amount of $300,000.00.

Appendix B
Opinion of the Texas Court of Civil Appeals

Based upon the verdict of the jury, judgment was entered for Walker and against the A. P. in the sum of $500,000. The judgment recited that there is no evidence to support the jury's findings of malice and $300,000 for exemplary damages.

Appellant contends that the court erred in rendering judgment for appellee rather than it because (1) as a matter of law the evidence conclusively established that the "charge" and "command" statements were substantially true; (2) each statement was a fair comment about a matter of public concern published for general information and thus privileged under the provisions of Art. 5432, V. A. C. S.; (3) such statements made without malice are protected by the First and Fourteenth Amendments to the Constitution of the United States; (4) over objection appellee was permitted to testify that he did not assume command; (5) it held as a matter of law that the "charge" and "command" statements were libelous rather than submitting issues as to each; (6) the evidence conclusively established as a matter of law that the "charge" and "command" statements were made in good faith with reference to matters it had a duty to report to its members and thence to the public; (7) the amount of damages found were so grossly excessive as to be patently wrong and unjust and the findings in response to the damage issue No. 9 and to special issues one, two, three, five, six and seven are so against the weight and preponderance of the evidence as to be manifestly wrong and unjust and thus insufficient to support such answers; and (8) the evidence conclusively established as a matter of law that the jury was guilty of material misconduct which probably resulted in injury to the defendant.

We affirm.

Appendix B
Opinion of the Texas Court of Civil Appeals

EVIDENCE

In discussing the points relating to the quantity and quality of the evidence we have examined the complaints of the appellant in the light of the Article by Chief Justice Robert W. Calvert entitled, " 'No Evidence' and 'Insufficient Evidence' Points of Error", 38 Tex. Law Rev. 361 and authorities therein cited.

The evidence considered in its most favorable light in support of the findings of the jury and the judgment of the court is in essence as follows: At approximately 4:00 P. M. of the day in question, a ring of Federal marshals had encircled the Lyceum Building. Walker arrived on the campus about 8:45 P. M. At that time a loud, violent riot was in progress in an area of the campus known as the Circle. A crowd assembled in the Circle area, began taunting and jeering the marshals. By 8:00 P. M. a full scale riot had erupted which was to continue all night, destroy 16 automobiles, kill two people, injure 50. The rioters would form into groups and charge toward the marshals, throwing bricks, bottles, rocks, sticks and other missiles. The rioters attempted to charge the marshals with a fire truck and then with a bulldozer. "Molotov cocktails" were hurled at the marshals. Finally rifle fire erupted. The next morning the campus looked like a battlefield. Soon after his arrival, Walker, after some urging to say a few words, spoke from the steps of the Confederate Monument. While there is some dispute as to what he said, there is testimony that he told the assembled groups that while they had a right to protest that violence was not the answer. He was "booed" or "jeered" at this time and again when urging a cessation of violence. He and others walked in the direction of the Lyceum Building where the marshals

Appendix B
Opinion of the Texas Court of Civil Appeals

were stationed but he never came closer to the marshals than the monument or the length of a football field. He was there to watch what happened. He wanted a peaceful demonstration as a protest. His presence there was not illegal or unlawful. He had the same right to come upon the campus and observe the activity as did the various members of the press who were there to observe and to report. He was one of the crowd. He was not in the forefront, never in front of the crowd. He never hurled any rock, brick or other missile in the direction of the marshals or otherewise. He did not participate in the riot. He never directed or suggested that others do so. He issued no directions nor did he counsel or suggest to others that they charge the marshals or take any other offensive action toward them. The crowd was disorganized. It was a leaderless group. Groups were milling aimlessly. No one, including Walker, made any effort to assume leadership. Walker did not run. He never got out of a slow walk; described as strolling, ambling, or "moseying" along. He never participated in the riot or violence in any manner. He made no effort to incite or move others to action or violence. When asked how to drive the marshals out, he said: "You don't."

Throughout the trial Walker maintained the firm position that because of his opposition to the use of Federal troops within a State, and his personal knowledge of the deviation between the occurrences at Little Rock where he was indeed in command and the newspaper stories of those occurrences, that he was at Oxford to see for himself at firsthand what was actually going on. He maintained that he did not assume command of the crowd, did not lead a charge, and did not participate in the rioting. He was present for the sole purpose of observing. The jury saw

him, observed his demeanor, heard what he said, and believed him.

"'No evidence' points must, and may only, be sustained when the record discloses one of the following situations: (a) a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; (d) the evidence establishes conclusively the opposite of the vital fact." 38 Tex. Law Review, pp. 361, 362, supra.

Subdivisions (a) and (b) above have no application to the record or the facts in this case. As to (c) we have viewed the evidence in its most favorable light in support of the findings of the jury upon which the judgment of the Court is based, considering only the evidence and the inferences which support the findings and rejecting the evidence and the inferences which are contrary to the findings. In the application of this test we have determined that all of the findings of the jury, upon which the Court based its judgment, are supported by ample evidence. Having reached this conclusion it follows that we find no merit in the appellant's contention that the evidence establishes conclusively the opposite of what the jury found. We find that none of the situations discussed by Judge Calvert under (a), (b), (c) or (d) is disclosed by the record. Further we have concluded from our study and examination of the entire record that the findings of the jury upon which the Court based its judgment is not so contrary to the great weight and preponderance of the evidence as to be clearly wrong or unjust.

Appendix B
Opinion of the Texas Court of Civil Appeals

Jurors are the exclusive judges of the controverted issues of fact raised by the evidence, of the weight to be given the evidence, and the inferences to be drawn therefrom. They are the exclusive judges of the credibility of the witnesses. "The law does not attempt to tell jurors what amount or kind of evidence ought to produce a belief in their minds. They may believe a witness although he has been contradicted. They may believe the testimony of one witness and reject the testimony of other witnesses. They may accept part of the testimony of one witness and disregard the remainder." McCormick & Ray, Texas Law of Evidence, § 3; Austin Fire Ins. Co. v. Adams-Childers Co., 246 S. W. 365 (Tex. Com. App., 1923).

"The mere fact that a verdict is against the preponderance of the evidence will not authorize a reviewing court to set it aside, if there is some evidence to support it, or evidence that would support a verdict either way. The court of civil appeals will set aside the verdict and findings of a jury only in cases where they are so against such a preponderance of the evidence as to be manifestly unjust or clearly wrong, or where they show clearly that the finding or verdict was the result of passion, prejudice, or improper motive, or in such obvious conflict with the justice of the case as to render it unconscionable." 4 Tex. Jur. 2d, p. 395, § 838, and authorities cited therein.

"Where evidence is conflicting, a reviewing court will not disturb the jury's verdict or findings if there is evidence of probative value to support them, unless the evidence is so overwhelming against the verdict or findings as to shock the conscience or show clearly that the conclusion reached was wrong or was the result of passion, prejudice or improper motive.

Appendix B
Opinion of the Texas Court of Civil Appeals

"The findings on conflicting evidence are usually regarded as 'conclusive,' 'binding,' or 'decisive,' and will be 'adopted' or 'accepted' as the findings of the appellate court, unless some good reason is presented that would justify the court in taking some other view.

"A jury finding on facts will not be set aside because it does not appear to be clearly right; it must appear to be clearly wrong before the appellate court will disturb it.

"The fact that the appellate court would not have found as the jury did is not the test to be applied on appeal. The true test is that made by the jury, on firsthand evidence, adduced before them from living witnesses whose credibility and the weight to be given their testimony were determinable by the jury. Where the jury's findings are in accord with the testimony of different disinterested witnesses, the fact that there is other testimony to the contrary does not authorize the appellate court to overturn the verdict. . . ." 4 Tex. Jur. 2d 390, § 837, and authorities cited therein.

In the application of the rules of law and the authorities above referred to, we overrule all points of error relating to the quantity or quality of the evidence supporting the findings of the jury upon which the Court based its judgment.

We find no error on the part of the Court in permitting Walker to testify that he did not assume command of the crowd.

He testified that he became a professional soldier upon completing four years at West Point in 1931 when he was commissioned as a Second Lieutenant. He had combat experience in the Mediterranean, European and Asiatic Theatres during World War II and in Korea. He finally

attained the rank of Major General. During the course of the trial Walker testified on several occasions without objection that during the Little Rock matter he took command of the troops, was assigned as commander or that the troops were under his command. In connection with the occasion in question at Ole Miss he was asked if he, "participated in any way in any activity of the crowd that was throwing things at the Marshals?" He answered without objection that he had not participated in any way. He was then asked if he assumed "any command over this crowd." Objection was made on the ground that the answer would be a conclusion on the part of the witness. The Court permitted Walker to answer and he stated, "I certainly did not" and in response to another question he answered without objection that he certainly knew what it meant to assume command. The news item in question had identified Walker as the former Major General who commanded the 101st Airborne Division at Little Rock followed by the statement, "Walker assumed command of the crowd."

The Article in question stated as a fact that Walker had "assumed command of the crowd." We think that Walker, subject of this remark, had the right to deny or affirm the truth of it. We think that the opinion in Goode v. Ramey, 48 S. W. 2d 719 (El Paso Civ. App., 1932, refused), is applicable. Therein it was stated, "We are not prepared to say under the record, as presented here, that it was error to admit the statement of the witness. The issue sought to be proved was not a mixed question of law and fact, but purely a fact question. We think the issue was one upon which a witness in possession of all the facts may properly state his opinion or conclusion to which such facts would fairly lead, notwithstanding the

witness' answer may embrace the very issue to be submitted to the jury. The conclusion of the witness is then testified to like any other fact to be considered by the jury for what they may believe it to be worth. Scalf v. Collin County, 80 Tex. 514, 16 S. W. 314; Adkins-Polk Co. v. John Barkley & Co. (Tex. Civ. App.) 297 S. W. 757; International & G. N. R. Co. v. Mills, 34 Tex. Civ. App. 127, 78 S. W. 11."

If we are mistaken in holding that the testimony of Walker was admissible we nevertheless overrule the point of error because we are of the opinion that the error, if any, in admitting the testimony, was harmless within the meaning of Rules 434 and 503, T. R. C. P.; Dallas Railway & Terminal Co. v. Bailey, 250 S. W. 2d 379, 151 Tex. 359 (Sup. Ct., 1952).

Fair Comment

The appellant contends that the "charge" and "command" statements constituted fair comment and thus were privileged under the provisions of Art. 5432, V. A. C. S. We find and hold that both the "charge" and the "command" statements were statements of fact and not of comment. *"Walker, who Sunday night led a charge of students against federal marshalls . . . ."* and *"Walker assumed command of the crowd . . . ."*, (emphasis added) are positive statements of fact. Truth of the statements would constitute a complete defense. Appellant failed in its effort to establish this defense to the satisfaction of the jury which found that neither of the statements were substantially true.

Appendix B
Opinion of the Texas Court of Civil Appeals

In an article on "Fair Comment" by John E. Hallen, 8 Tex. Law Review 41 (1929-30), the author in discussing Art. 5432, V. A. C. S., states: "The 1927 Libel Law provides:

"'The publications of the following matters by any newspaper or periodical shall be deemed privileged and shall not be made the basis of any action for libel . . . .

"'4. A reasonable and fair comment or criticism of the official acts of public officials and of other matters of public concern published for general information.'

"Paragraph 4 was in no way changed by the 1927 amendments and has appeared exactly in that form since 1901.

". . . the right of fair comment was not created by the statute. It is well recognized by the common law. Every one has the right to comment on matters of public interest and general concern and within limits is not liable for stating his real opinion on such subjects, however severe the criticism may be. It is immaterial whether or not the criticism is sound, or whether the court or jury would agree with it, so long as it represents the honest opinion of the speaker upon a matter of recognized public interest.

"The statute expressly declares that fair comment by newspaper and periodicals is privileged. But since this right was enjoyed by everyone at common law, the statute gives the newspaper no added privileges. Nor is it to be construed as taking away the common law defense of individuals. . . . (p. 41)

"It should be remembered that there is a distinction between comment or criticism, which is the opinion of the

speaker or writer upon certain facts, and the facts upon which that opinion is based. A misstatement of fact cannot ordinarily be justified by a plea of fair comment. . . . (p. 43)

"It has already been said that fair comment is a criticism, discussion, or expression of opinion upon existing facts and does not protect against a misstatement of the facts themselves. The question of what should be called fact and what comment is difficult. . . ." (p. 53)

"Texas has swung from its early holding in the Copeland Case (Express Printing Co. v. Copeland, 64 Tex. 354 (1885) that an untrue charge of crime, honestly and reasonably made, about a public officer, is privileged, to its present position that such a charge cannot be justified by a newspaper. In following its present doctrine Texas is supported by the weight of authority, and there are strong reasons for its holding." (p. 99)

An article under the heading of "Libel and Slander—Fair Comment—Statements of Opinion" by Tom J. Mays appears in 16 Tex. Law Review 87 (1937-38). He commences with, "A judicial warning to the press with respect to comment and criticism upon matters of public interest is discernable in the recent decision of Houston Printing Co. v. Hunter." 105 S. W. 2d 312 (Fort Worth Civ. App., 1937), affirmed 106 S. W. 2d 1043 (Tex. Sup., 1937). The article continues, "That fair comment and criticism upon such matters is qualifiedly privileged is quite generally recognized both at common law and in Texas by statute. On the other hand, where false allegations of fact are made regarding matters of public concern, the courts are not in accord. Perhaps a majority of the courts hold that false allegations of fact are not entitled to immunity even though

made in good faith and without malice. . . . . Texas is clearly in line with the majority, holding that falsification of the facts is never privileged.

"Although the distinction between statements of fact and statements of opinion or comment has been freely recognized, it is generally conceded that distinguishing the two becomes a difficult problem in many cases." (p. 88)

"Most of the cases, it seems, wherein the words are held actionable as statements of fact, have found imputation of malfeasance, misconduct, or corruption in office, or imputations of evil or corrupt motives in the administration of duties. These being treated as statements of fact, then certainly a false imputation of crime committed by a public officer or candidate would be actionable as a statement of fact in Texas. (pp. 89-90) . . .

"It is manifest that some method is needed by which to distinguish between statements of fact and comment; and it is equally certain that no absolute test can be laid down. But it is submitted that more desirable and satisfactory results can be reached." (p. 90)

The author suggests the following test by which to distinguish statements of fact from comment, "Where the statements alleged to be libelous can be reasonably construed by the reader as an expression of opinion only, on the basis of facts either already known to the reader or else reasonably assumed by the person writing the statement to be known to the reader, then it should be regarded as fair comment. Where, however, the statement alleged to be libelous, as reasonably construed, conveys to the reader not only an expression of the writer's opinion, but also certain supposed information, and this information conveyed does not accord with the true facts, it is not comment, but should be treated as a statement of fact.

Appendix B
Opinion of the Texas Court of Civil Appeals

"Under this test, whether a publication will be treated as a statement of fact and libelous, if untrue, will depend upon the surrounding circumstances of each particular case. Under such a guidance, even an imputation of crime might be held to be merely an expression of opinion and not actionable." (p. 91)

In, "The Press and the Law in Texas" by Norris G. Davis, University of Texas Press, Austin, 1956, it is stated that, ". . . the right of fair comment is a weak defense in most libel suits. It is subject to so many limitations that it is seldom completely applicable. There are three groups of limitations. First, the comment must be limited to matters of public concern. Second, the article must be a statement of opinion—or comment—rather than a statement of fact, a very difficult distinction to make. Finally, the comment must be reasonable and fair and made in good faith, and this limitation is also difficult to define." (p. 65)

"Even if the subject matter and the person concerned are clearly matters of public concern, there remains two severe limitations. One of these, the requirement that the story or article must be comment, not a statement of fact, has caused by far the most trouble. The separation of comment from factual statements in most stories and articles is extremely difficult, and Court decisions have shown confusion on the point." (p. 67) "One important rule developed for separation of fact and comment is the theory that imputation of dishonest motives to a public official or imputation of an act constituting a crime under the law is a statement of fact and cannot be considered fair comment." (p. 68) San Antonio Light Pub. Co. v. Lewy, 113 S. W. 574 (CCA of Texas, 1908, Ref.); Forke v. Homann, 39 S. W. 210 (CCA of Texas, 1896, ref.). The author in reference to the article by Mays in 16 Tex. Law Review 87

(1937-38), states: "One writer who has studied the fair-comment cases in Texas and has found the same confusion illustrated here has offered the following definitions of 'opinion statements' and 'fact statements.'" (p. 73) He then quotes the test suggested by Mays and continues: "Certainly the courts should become aware of the need to distinguish statements of fact from opinion on a less arbitrary basis than is now customary. If the Supreme Court would adopt such a definition as the one quoted above, it would do much toward creating such an awareness. Actual differentiation of fact and opinion would still be difficult, but court decisions would be more just. (p. 74)

"Actually, it is clear that almost any story, editorial, or other type of news article must be a mixture of statements of fact and comment, even though the writer attempts to confine himself to comment. Any type of comment, in implication at least, must be based on fact; and newsmen know that the most effective comment is that based on startling and important statements of fact. Newsmen should therefore be prepared to prove the truth of any statement of fact and to rely on fair comment as defense only for the conclusions drawn from these true facts. They should strongly urge the courts also to make the distinction between fact and opinion rather than, as they so often do, plead all defenses to all parts of a story alleged to be libelous." (p. 74)

In our opinion the test suggested by Mr. Mays and favorably commented on by Mr. Davis is a good one. We think that its application to the facts in this case support our holding that the statements involved were statements of fact and that the appellant was not prepared to prove the truth of either statement. The information conveyed was not in accord with the true facts. Reference is made to the

complete text of the articles above referred to and the authorities cited therein. See also 36 Tex. Jur. 2d Libel and Slander, §§ 87, 89, 92 and 171 together with cases cited under each.

We find no merit in appellant's contention that the reports, made without malice, are protected from the claim of libel by the First and Fourteenth Amendments to the United States Constitution. These Amendments prohibit Congress from making laws abridging freedom of speech and of the press and the State from making or enforcing laws of similar nature.

"The interest of the public in obtaining information about public affairs and of the defendant in discussing such matters is often brought directly in conflict with the plaintiff's claim to his own good name, and the law must draw a line between them. . . . (8 Tex. Law Rev. 41, p. 98)

"It is not true that false and derogatory statements about a man's character are today always actionable. If they were, the whole defense of privilege would be swept away. Nor is it true that everything may be justified under a defense of free speech or press. These rights as embodied in constitutions and statutes, were designed primarily to prevent interference by the government with a man's talking or writing, and not to do away with responsibility for what was said. If 'Freedom of the Press' always furnished a complete defense there could be no such tort as libel. . . ." (8 Tex. Law Rev. 56)

"It is submitted that any decision based entirely upon the right to an inviolate character or freedom of speech is unsound. Either doctrine given full sway would annihilate the other. . . ." (8 Tex. Law. Rev. 61)

"Articles 5430, 5431, 5432, and 5433, Vernon's Texas Civil Statutes, 1948, clearly declare the policy of this State

regarding the question of libel. The law protects the right of a citizen to defend his reputation and good name from libelous publications, and this right is zealously guarded. Bell Pub. Co. v. Garrett Engineering Co., 141 Tex. 51, 170 S. W. 2d 197; Belo & Co. v. Looney, 112 Tex. 160, 246 S. W. 777; Express Pub. Co. v. Keeran, Tex. Com. App., 284 S. W. 913." Fitzjarrald v. Panhandle Pub. Co., 228 S. W. 2d 503 (Tex. Sup., 1950).

We find no application of the authorities cited by the appellant to the facts of this case.

LIBELOUS PER SE

Did the Court commit error in holding as a matter of law that the "charge" and "command" statements were libelous per se, rather than to submit same to the jury for its determination? We think not. The language contained in the statements is not ambiguous. There can be no doubt as to the meaning of either.

Each of the statements imputed to Walker the crime of insurrection against the United States. It is undisputed that the crowd on the Ole Miss Campus was engaged in rioting and by force intefering (*sic*) with the efforts of U. S. marshals to enforce an executive order of the President of the United States issued under sanction of law and of applicable statutes. Insurrection is punishable by fine or imprisonment or both.

The statements further imputed to Walker responsibility for the death of two men and of the wanton destruction of property, all accomplished by students and others under his leadership and direction. The onslaught of the riotous crowd "led" by Walker who had "assumed com-

mand" was such that Van Savell considered he was, "lucky to have been arrested and glad to be behind closed, heavily guarded doors."

It imputed that Walker, who "advised on several tactics," none of which were ever specified, directed or advised on the making and use of the molotov cocktails (gasoline bombs) and other offensive weapons used by the rioters.

"The court should construe the meaning of unambiguous language, pass on its defamatory character, and instruct the jury accordingly. But where the language is ambiguous or of doubtful meaning there is a question for the jury." 36 Tex. Jur. 2d 496, § 166; p. 482, § 156 of the same text and cases cited under each. Fitzjarrald v. Panhandle Pub. Co., supra.

"To charge a person with or impute to him the commission of any crime for which punishment by imprisonment in jail or the penitentiary may be imposed is slanderous or libelous per se." 36 Tex. Jur. 2d 288, § 7; H. O. Merren & Co. v. A. H. Belo Corp., 228 F. Supp. 515.

"Any written or printed language tending to degrade a person in the estimation of honorable people, or imputing to him disgraceful or dishonorable acts, is libelous per se." 36 Tex. Jur. 2d 297, § 13.

"The language claimed to be defamatory must be taken as a whole. Thus, a newspaper article must be considered in its entirety in determining the sense in which its language is used, and whether the article, or a particular statement therein, is libelous." 36 Tex. Jur. 2d 313, § 27.

" 'Libelous per se' means that written or printed words are so obviously hurtful to person aggrieved by them that

they require no proof of their injurious character to make them actionable." Rawlins v. McKee, 327 S. W. 2d 633 (Texarkana Civ. App., 1959, ref., n.r.e.).

"Defamatory language may be actionable per se, that is, in itself, or may be actionable per quod, that is, only on allegation and proof of special damages. The distinction is based on a rule of evidence, the difference between them lying in the proof of the resulting injury. Language that necessarily, in fact or by a presumption of evidence, causes injury to a person to whom it refers is actionable per se. In other words, the defamatory words must be of such a nature that the court can presume as a matter of law that they will tend to disgrace and degrade the person or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided. Where the language is actionable per se damages are conclusively presumed and need not be proved." 36 Tex. Jur. 2d 280, § 2.

"To be libelous a publication must be defamatory in its nature, and must tend to injure or impeach the reputation of the person claimed to have been libeled. The language used, taken in connection with the facts and circumstances alleged by way of innuendo, must be reasonably calculated to produce one or more of the results mentioned in the statutory definition; that is, it must have the effect of injuring or tending to injure the person to whom it refers to the extent of exposing him to public hatred, contempt, ridicule, or financial injury, or to impeach his honesty, integrity, or virtue.

"It is not necessary, however, that the language have all the injurious or pernicious tendencies enumerated in the statute; it is actionable if it has any of them. . . .

Appendix B
Opinion of the Texas Court of Civil Appeals

"A publication that tends to subject the plaintiff to public contempt, or that impeaches his integrity or reputation, is libelous though it does not charge him with a crime.

"The term 'public hatred,' as found in the statutory definition, signifies public or general dislike or antipathy." 36 Tex. Jur. 2d 285, § 6.

DAMAGES

In connection with special issue No. 9 the jury was instructed that it may take into consideration such damages, if any, to the reputation of the plaintiff and such mental anguish, if any, and humiliation, if any, and embarrassment, if any, which plaintiff may have sustained as a direct and proximate result of the statements inquired about. The jury awarded $500,000.00.

From our investigation and study of the record we are unable to find any legal justification to disturb the award of damages. If any improper influences were present they do not appear from the record. Under the pleadings the appellee sought damages, including exemplary damages, in the sum of $2,000,000.

"Mental suffering on the part of the person defamed is one of the direct results of a libel or slander. Accordingly, injury to the feelings, humiliation, and anguish of mind are proper elements of compensatory damages, provided they are the direct and proximate result of the defamation. This suffering is classed as general damages, that are presumed to have been sustained, and that, in actions for libel, are recoverable under a general averment, without specific proof that they were incurred, and, by virtue of statute, regardless of whether there was any other injury or damage,

even though the publication was not libelous per se." 36 Tex. Jur. 2d 402, § 98.

"The plaintiff is entitled to compensation for injury to his character or reputation caused by the defamation. . . . It follows that the jury, in fixing the amount of recovery, may consider the loss of, or injury to, character or reputation, even though there is no proof thereof nor any proof of good character. . . ." 36 Tex. Jur. 2d 400 § 97.

"In other words, a general allegation of damages will admit evidence of those damages naturally and necessarily resulting from the defamation charged. It is unnecessary to itemize the elements of general damages; rather, the amount may be alleged in the aggregate. Thus, the plaintiff need not aver the nature, character or extent of the mental suffering caused, or even that he thereby suffered any agony, but it is sufficient to aver the damages he sustained by reason thereof. . . ." 36 Tex. Jur. 2d 445, § 126.

"Generally speaking, the damages resulting from a libel or slander are purely personal and cannot be measured by any fixed standard or rule. The amount to be awarded rests largely in the discretion of the jury, or the court in a case tried without a jury, and an appellate court will not disturb the verdict or award unless it appears from the record to be excessive or the result of passion, prejudice, or other improper influence. . . .

"In fixing the amount the jury may take into consideration the motives of the defendant, and the mode and extent of publication. . . ." 36 Tex. Jur. 2d 405, § 102.

EXEMPLARY DAMAGES

By counter-points the appellee contends the court erred in setting aside the findings of the jury in response to

special issues Nos. 4, 8, 10 and 11, which related to malice and exemplary damages.

Issues Nos. 4 and 8 inquired if appellant was actuated by malice, and malice was defined, "you are instructed that by the term 'malice' is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it."

The appellee had the burden of proving that the appellant's act or acts were such as to fall within the above definition before he was entitled to a finding of malice and exemplary damages.

The statement of facts consists of eleven volumes and 2126 pages. The entire record has received our close and sustained attention.

In view of all the surrounding circumstances, the rapid and confused occurrence of events on the occasion in question, and in the light of all the evidence, we hold that appellee failed to prove malice as defined, and the trial court was correct in setting aside said findings.

We think there is yet another reason to support the Court's action in disregarding the jury's answers to the issue relating to malice and exemplary damages, namely, the lack of necessary pleadings and proof required under the holdings in Western Union Tel. Co. v. Brown, 58 Tex. 170 (Tex. Sup., 1882); Wortham-Carter Pub. Co. v. Littlepage, 223 S. W. 1043, p. 1046 (Fort Worth Civ. App. 1920, no writ hist.), and Fort Worth Elevators Co. v. Russell, 70 S. W. 2d 397 (Tex. Sup., 1934).

The record leaves some doubt as to whether A. P. is an incorporated or an unincorporated association. It does

appear, however, that its composition, the manner in which it functions, and its organizational set-up is more akin to a corporation than not and that the holdings in the above cited cases would be applicable.

We think the record in this case will support our view. Certainly, A. P. is not an individual. Having no mind and being an entity only by a fiction of law, it must be held incapable of entertaining actual or express malice unless the requirements of the holdings in Fort Worth Elevators Co. v. Russell, Western Union Tel. Co. v. Brown and Worthan-Carter Publishing Co. v. Littlepage, supra, are complied with. A. P. is referred to as a corporation in the appellee's brief.

Jury Misconduct

We find no error in the action of the Court in overruling the appellant's amended motion for new trial because of alleged misconduct of the jury.

During a general discussion of the case a juror remarked that the A. P. (or news media generally) was always hurting someone by the printing of false or malicious reports or words to this effect. There was considerable discrepancy in the testimony of the five jurors called to testify on the motion for new trial as to whether the reference was to the A. P. or to news media generally. It was a casual statement. "Nobody made any comment at all" about it. It is undisputed that it was quickly dropped. Who made the statement, which jurors or how many probably heard it or specifically at what stage in the proceedings the statement was made was not shown. It was dropped and not again mentioned. The jury discussed and answered the

issues in order. They were 11 to 1 on the issues preceding those relating to malice and exemplary damages. While discussing these issues a remark was made that the full amount should be awarded because the A. P. had plenty of money and it was mentioned "about the Georgia football coach (Wally Butts) collecting." The jurors were in dispute as to whether the statement concerning Butts was ever made. It is without dispute that the statements were made after the jury had already found damages in the sum of $500,000 and were considering the issues on malice and exemplary damages.

The juror who was the last to agree on the $500,000 was the juror who stopped the discussion as to how much money the Press had. He pointed out that it did not make any difference and was out of order. The matter was promptly dropped. The only answers which could have been influenced or affected by such statements, if any, were those to the issues on malice and exemplary damages and these findings of the jury were disregarded by the Court on other grounds in the rendition of judgment.

In order to justify a new trial under Rule 327, T. R. C. P., the movant has the burden of establishing to the satisfaction of the Court that it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted by reason of the alleged jury misconduct. The appellant failed to meet its burden under this rule.

The trial court in its findings of fact and conclusions of law found that none of the statements singly or collectively induced any juror to change an answer or vote differently than he would otherwise have done. That there

was no showing of probable injury to the appellant because of such statements.

"When a trial court hears the testimony of jurors on an issue of misconduct, alleged to have occurred during the jury's deliberation upon its verdict, he is accorded the same latitude in passing upon the credibility of the witnesses and of the weight to be given to their testimony as the jury had upon the trial of the original cause. If there be any inconsistencies or contradictions in the testimony of a witness upon the hearing of a motion for new trial, it rests within the sound discretion of the trial court to harmonize and reconcile such conflicts so far as possible. A juror's testimony upon such hearing may be so contradictory and inconsistent that the trial court in exercising its privilege to pass upon the credibility of the witness may be justified in disregarding his entire testimony. Carl Construction Co. v. Bain, 235 Ky. 833, 32 S. W. (2d) 414." Monkey Grip Rubber Co. v. Walton, 122 Tex. 185, 53 S. W. 2d 770 (1932).

In our opinion the alleged improper statements, when viewed in the light of the evidence on the motion for new trial and on the trial of the case and on the record as a whole, did not probably result in injury to defendant. Rules 327 and 434 T. R. C. P.

Having considered each of the appellant's points of error and the cross-points raised by the appellee and having concluded that each should be they are each and all accordingly overruled, and the judgment of the trial court is affirmed.

Per Curiam

July 30, 1965

APPENDIX B

Opinion of the Trial Court

CHAS. J. MURRAY
District Judge
17th Judicial District of Texas
Civil Courts Building
Fort Worth 2, Texas

July 29, 1964

Mr. C. J. Watts, Attorney
219 Couch Drive
Oklahoma City, Oklahoma

Mr. William Andress, Jr., Attorney
627 Fidelity Union Life Building
Dallas 1, Texas

Mr. J. A. Gooch, Attorney
1800 First National Bank Building
Fort Worth, Texas

Gentlemen:

I am entering judgment for the plaintiff on the jury verdict as to special issues one, two, three, five, six, seven and nine, and judgment for the defendant as to issues four, eight, ten and eleven.

At the time the charge to the jury was being prepared, you will recall I expressed the opinion that the alleged libelous statements contained in special issues one and five were statements of fact and not opinion, and, at least as to the statement set out in issue number one, was a charge of a commission of a crime. I submitted the defense of truth as to the statements, and the jury found that they were not substantially true. I believe there is evidence to support these findings. I now have some doubt as to whether I should

have submitted the statement, "Walker assumed command of the crowd," because it does not accuse Walker of the commission of a crime. However, in view of my decision as to special issue number one, this is immaterial.

I submitted issues as to fair comment and good faith (despite my then expressed opinion that they did not constitute defenses to a statement of fact charging the plaintiff with commission of a crime) so as to get jury findings and thus avoid a new trial in the event an appellate court disagreed with my conclusions. Since the jury answered issues two, three, six and seven as they did, I concur with these answers as a matter of law.

Turning now to issues four, eight, ten and eleven, I find there is no evidence to support the jury's answers that there was actual malice by Associated Press in publishing the stories of October 2 and 3, 1962. As you will recall, I also expressed doubt when the charge was being prepared as to whether I should even submit malice and did so only to get a jury finding as I did on the defendant's claimed defenses of fair comment and good faith.

Under Texas Law, the news stories complained of are not of themselves evidence of malice without further proof. Plaintiff claims that malice is shown by the failure of the Associated Press to check the story written by its young reporter, Van Savell, because there was a conflict between the story as written, and as related by Savell to Thomas, an AP employee in its Atlanta office. This alleged conflict related only to whether General Walker led a charge against the federal marshals *before* rather than *after* his speech to the students on the Confederate Monument. I fail to ascertain how the failure to check such a minor discrepancy could be construed as that *entire want of care* which would

amount to a *conscious indifference* to the rights of plaintiff. Negligence, it may have been; malice, it was not. Moreover, the mere fact that AP permitted a young reporter to cover the story of the riot is not evidence of malice. Wisdom and good judgment do not necessarily come with age, nor are they necessarily denied youth. In my opinion New York Times vs. Sullivan, 11 L. ed. 2nd 686; Wortham-Carter Publishing Company vs. Littlepage, 223 SW 1043 and Fitzjarrald vs. Panhandle Publishing Company, 228 SW 2nd 499, support these conclusions.

Plaintiff's (*sic*) urge that this case is comparable to United Press International, Inc. vs, Mohs (Eastland Court of Civil Appeals—unreported) decided on June 26, 1964. I do not agree. In the UPI case, Miller, the night editor of UPI, *knew* that another story had been written at and sent from his UPI office the same night as the second story found to be libelous. The first story contained no statement that Mohs had been ordered arrested and handcuffed; that Mohs had been caught lying or that he had been charged with any offense for landing his plane on White Rock Lake in Dallas. Between the time this first story was written and sent from UPI's office, someone in this office called the police headquarters and learned that as far as the police knew, Mohs had not been charged with any offense. Miller himself, nor anyone in his office, made any attempt to verify the facts of the landing on the lake, other than the call to police headquarters, yet Miller then distributed the second story which said that Mohs had been arrested, handcuffed and charged with violation of a city ordinance for landing on the lake. None of this was true. This second story was based on information received from one DeHarrow. Miller knew the story (the first one) previously written in his office was materially different from the story related by

DeHarrow (the second story). He had many reasons to question the truth of the story attributed to DeHarrow, but made no attempt to check it. The Eastland Court found that these facts raised jury issues "as to whether there was such a want of care as could raise the belief that his acts (and thus the acts of UPI) were the result of a conscious indifference to the rights of Mohs."

As I have stated above, in the Walker case the only discrepancy was whether Walker led a charge before or after his speech on the monument, and not whether he did or did not lead a charge at all. This evidence falls short of that set out in the UPI vs. Mohs opinion.

Since I have determined that there is no actual malice in this case, the question arises as to whether the rule of New York Times vs. Sullivan (which prohibits a public official recovering damages for libel when there is no actual malice) should apply to a public figure such as plaintiff. If it does, then the entire jury verdict must be set aside, and judgment entered for defendant.

The evidence is undisputed that General Walker was a public figure at the time of the riot on the Old Miss Campus.

Freedom of the Press is perhaps the most important protection against tyranny that we find in a free society. Without it, the public could not know whether one's right to speak, to worship his creator as he chooses or to enjoy a fair trial had been abridged. Americans everywhere depend on news media of all types to provide accurate information on the daily affairs of men and nations. This imposes a great duty and responsibility on the news gathering and distributing agencies of this country, and they should be protected to the extent necessary for them to properly function.

Appendix B
Opinion of the Trial Court

However, I see no compelling reasons of public policy requiring additional defenses to suits for libel. Truth alone should be an adequate defense. The Sullivan case is limited, and I feel it should be limited, in its application to public officials. It does not apply to this case.

Jury findings as to issues four, eight, ten and eleven are set aside, and judgment will be entered for the plaintiff in the amount of $500,000.00 and costs.

Very truly yours,

/s/ CHAS. J. MURRAY
Charles J. Murray, Judge
17th District Court

CJM: oec

APPENDIX C

Portions of Record Raising Constitutional Questions Below

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

IN THE

DISTRICT COURT OF

TARRANT COUNTY, TEXAS

17TH JUDICAL DISTRICT

No. 31741-C

EDWIN A. WALKER

vs.

THE ASSOCIATED PRESS

SECOND AMENDED ORIGINAL ANSWER OF DEFENDANT, THE ASSOCIATED PRESS

Now comes defendant, The Associated Press, and makes and files this its Second Amended Original Answer directed to Plaintiff's Second Amended Petition, and says:

* * *

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15. (Transcript, pp. 21 and 26-35)

III.

By way of further answer herein, and without waiving any of the foregoing pleas, defendant, The Associated Press, would respectfully show to the Court and the jury that the plaintiff is not entitled to recover damages in this cause of any nature for each and all of the following reasons considering all the material facts and circumstances surrounding the plaintiff's alleged claim of damage:

(1)

Plaintiff by his own statements in pleadings filed in this cause has alleged that he resigned his Army Commission in order to speak out and install himself as a leader and public figure. Plaintiff, Edwin A. Walker, voluntarily injected himself into a situation of turmoil, resentment and excitement in Mississippi and of great national publicity and interest everywhere at the time he uttered certain public statements, more fully hereinafter alleged, on television, radio and to newsmen and by his subsequent trip to Jackson, Mississippi, and Oxford, Mississippi, at the very height of such tension and turmoil between September 10 and October 1, 1962.

(2)

The publications complained of in this action insofar as the same consist of comments were and are fair comments made in good faith upon facts which related to matters that were and are affairs of public interest, importance and concern and related to acts and utterances of plaintiff, a public figure, in public places and at public meetings.

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

(a) The background and events into which Walker injected himself are set forth in the following paragraphs.

(b) On or about May 31, 1961, one James H. Meredith, a colored person, filed a complaint in the United States District Court, Southern District of Mississippi, and on behalf of himself and all other colored students in the State of Mississippi similarly situated, against Charles D. Fair, President of the Board of Trustees of the State Institutions of Higher Learning in the State of Mississippi, and others connected with the University of Mississippi, seeking admission to said University. Thereafter, and on or about February 3, 1962, the United States District Court for the Southern District of Mississippi rendered a decision reported in 202 F. Supp. 224, denying Meredith rights of admission to the University of Mississippi.

Thereupon Meredith appealed to the United States Court of Appeals for the 5th Circuit, at New Orleans, and on or about June 25, 1962, said Court rendered a decision (*305 F. 2d 343*) in which said Court reversed the decision of the United States District Court, thereupon remanding said action, with directions to the United States District Court for the Southern District of Mississippi to grant forthwith the relief prayed for by Meredith and to issue a permanent injunction against each and all of the defendants in said suit and all persons acting in concert with them, as well as all persons having knowledge of said decree, and directing and compelling admission of the said Meredith to the University of Mississippi as a student.

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

(c) Thereafter, and on or about July 26, 1962, the United States Court of Appeals, 5th Circuit, at New Orleans, vacated certain stay orders signed by Federal Judge Ben F. Cameron, and further directed the U. S. District Court for the Southern District of Mississippi to enter the judgment and the injunction as theretofore ordered (306 F. 2d 374). On July 28, 1962, the said United States Court of Appeals for the 5th Circuit, at New Orleans, also entered a certain interim order to the same effect.

(d) Subsequently Judge Ben F. Cameron issued three other successive stays of execution of the mandate of the United States Court of Appeals, 5th Circuit, which ordered the admission of Meredith to the University of Mississippi, said stays to operate pending an appeal to the Supreme Court of the United States. On or about September 10, 1962, Mr. Justice Black of the U. S. Supreme Court entered an order (1) to vacate the orders of Judge Ben F. Cameron, and (2) that the judgment and mandate of the Court of Appeals for the 5th Circuit at New Orleans should be obeyed and immediately carried out, and (3) that pending any appeal, the parties were enjoined from taking any steps to prevent enforcement of the Court of Appeals, 5th Circuit, judgment and mandate.

(e) On or about September 13, 1962, the United States Court for the Southern District of Mississippi as directed by the U. S. Court of Appeals, 5th Circuit, at New Orleans, issued an injunction and ordered that the said Meredith be admitted to the University of Mississippi forthwith.

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

(f) On or about September 20, 1962, the said Meredith appeared on the campus of the University of Mississippi accompained by U. S. Marshals for the purpose of registering as a student pursuant to the orders of the United States Courts above set forth, but the Governor of Mississippi, the Honorable Ross Barnett, then and there rejected the application of the said Meredith to the University of Mississippi.

(g) Again, and on or about September 25, 1962, the said Meredith appeared at the offices of the Board of Trustees of State Institutions of Higher Learning, at Jackson, Mississippi, for the purpose of registering as a student pursuant to the prior orders of the United States Courts. When Meredith sought to enter the offices, as aforesaid, the Honorable Ross Barnett, Governor of the State of Mississippi, and certain officers acting under his direction, again barred the said Meredith and denied him admission to the University of Mississippi. On or about September 26, 1962, the said Meredith sought to enter the campus of the University of Mississippi where he was barred from so entering by the Honorable Paul B. Johnson, Jr., Lieutenant Governor of the State of Mississippi, and certain state police acting under his orders, thereby denying the aforesaid Meredith admission to the University of Mississippi. On September 25, 1962, the United States Court of Appeals for the 5th Circuit, at New Orleans, entered another restraining order against the Honorable Ross Barnett, Governor of the State of Mississippi, and other named officials in said State, and all persons in active concert or in partic-

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

ipation therewith, from interfering with or obstructing in any manner the admission of the said Meredith to the University of Mississippi.

(h) Thereafter, on the same day, the United States Court of Appeals for the 5th Circuit issued its orders requiring the aforesaid Ross Barnett, Governor of the State of Mississippi, and the Honorable Paul B. Johnson, Jr., Lieutenant Governor of the State of Mississippi, to appear before said Court and show cause why they should not be held in civil contempt for willfully disobeying the orders of the United States Courts and barring the admission of Meredith to the University of Mississippi, and on or about September 28 the said Court entered its judgment and order adjudging the said Ross Barnett and Paul B. Johnson, Jr. guilty of civil contempt and levied fines to continue on a daily basis unless on or before October 2, the said Governor and Lt. Governor should show to the Court that they had fully complied with all restraining orders of all the United States Courts, and that they had notified enforcement officers in the State of Mississippi to cease and desist from interfering with the orders of the aforesaid Courts and to cooperate with the officers and agents of the United States in the execution of all orders and injunctions to the end that Meredith would be permitted to register as a student at the University of Mississippi.

(i) That the attempts of the said James H. Meredith to enter the University of Mississippi and the actions of the authorities in Mississippi preventing his entry, and the actions of the various United States Courts in making and

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

entering said injunctions and mandates, as above set forth in the preceding paragraphs, had all been given wide publicity throughout the United States by newspapers, radio and television, and were matters of general knowledge and affairs of great public interest and concern prior to September 30, 1962. The plaintiff in this cause knew, or reasonably should have known of the court orders, injunctions and mandates herein pleaded based on knowledge acquired from an ordinary reading of the newspapers and reports from other news media and he also knew of the defiance of Governor Ross Barnett, Governor of the State of Mississippi, and of the Lt. Governor towards the fulfillment of the court orders of the United States Courts above set forth.

(3)

The plaintiff, the former Major General of the Army of the United States, following his resignation therefrom for the stated purpose of speaking out in protest as a private citizen, had made frequent public statements and had made an unsuccessful venture into politics as a candidate for Governor of the State of Texas.

Plaintiff was a well known public figure because of his long military career, his commands and duties with the Army of the United States, his role as Commanding General of the troops in the Little Rock, Arkansas, integration crisis in 1957, his resignation from the Army of the United States with the rank of Major General with the avowed statement and purpose of being able to protest and take a

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

stand and position in matters of public interest and affairs, and his candidacy for Governor of the State of Texas in 1962. With such background as a public figure, the plaintiff, during the critical times involved herein, between September 10, 1962 and October 1, 1962, injected himself into the Mississippi crisis with the request and/or notice for frequent press releases or conferences, from Dallas, Texas, Jackson and Oxford, Mississippi, and thereby invited comment as to his activities. His public utterances and statements were all in protest and opposition to duly constituted governmental and judicial authority and relating to the admission of Meredith to the University of Mississippi, and were in violation of the injunctive decrees issued by the United States Courts, as herein set forth, and in favor of the positions then being taken by Governor Ross Barnett and other officials in Mississippi who were seeking to obstruct Meredith's entry as a student at the University of Mississippi.

Notwithstanding such knowledge, the plaintiff by radio and other news media, beginning on or about September 27, 1962, and thereafter, called for Americans 10,000 strong from every State in the Union to go to Mississippi and rally behind Governor Barnett in his stand against admitting Meredith, saying, among other things, "It is now or never. Bring your flag, your tent and your skillet."

The plaintiff, Edwin A. Walker, further injected himself into the crisis in Mississippi by proceeding to Jackson, Mississippi, on or about September 29, 1962, when he made further press releases and statements, and by then proceed-

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

ing to Oxford, Miss., where he held a further press conference on September 30, 1962, at all of which he reiterated his previous position.

At about 4:30 P. M. on the afternoon of September 30, 1962, the U. S. Marshals under orders to enforce the judgments, injunctions and mandates of the United States Courts for the enrollment of Meredith as a student at the University of Mississippi, proceeded on to the campus at Oxford, setting up a ring substantially around or in front of the Lyceum Building on the campus. At about the same time, Meredith was escorted to another part of the campus. Immediately after the arrival of the Marshals, students and others began to congregate in the Circle and in the streets adjacent to the Lyceum Building, facing the Marshals, at first taunting them with jeers and remarks, subsequently throwing lighted cigarettes and missiles at the Marshals and at the vehicles in which they arrived. The temper of the crowd became worse and more unruly, and at about 8:00 o'clock P. M. tear gas was fired. Thereafter, the rioting increased by the hour as the night progressed, resulting in injuries to many persons and much property damage to personal property, automobiles and to the campus itself.

While the plaintiff was in Oxford, Mississippi, and on or about September 30, 1962, at about 8:00 o'clock P. M., a proclamation was made by the then President of the United States to the effect that the Governor of the State of Mississippi and certain other officials and other persons had been and were willfully opposing and obstructing the enforcement of the injunctions, orders and judgments of the United

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

States Courts and the President thereupon commanded all persons engaged in such obstruction of court orders to cease and desist and to disperse and retire peaceably forthwith. In addition, the President of the United States made a TV and radio appearance on the same date at about 8 o'clock P. M. in which he sought in substance the same compliance with court orders. Notwithstanding said proclamation of the President of the United States and the appeal of the President, the said plaintiff immediately thereafter proceeded to the campus of the University of Mississippi, at Oxford, arriving there at approximately 8:45 P. M. on the night of September 30 and stayed on said campus for a period of several hours thereafter. Following the widespread dissemination of plaintiff Walker's statements in the press, TV and radio, not only in Mississippi but elsewhere, the plaintiff's very presence on the campus tended to increase the emotional excitement, the explosive condition, the courage, fervor and rage of the mob, thereby increasing the dangers and damage from what at first had been a demonstration, to a riot, mob violence, and to more organized and determined attacks upon the U. S. Marshals. At the time of the arrival of the plaintiff on the campus, there had already been violence and injury to persons and property, all of which was known to the plaintiff or should have been known in the exercise of ordinary observation on the campus. On the occasion in question, the plaintiff was welcomed by the crowd as its leader and he then and there made a speech which further excited and enraged the mob and, at least on one occasion, the plaintiff did proceed as a part of a

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

generalized movement towards the Marshals at the Lyceum Building accompanied or followed by a crowd of students and others shouting and yelling defiance, some of whom when close enough to the Marshals hurled missiles toward them. On many occasions during the night in question, plaintiff would move back and forth through the Circle (an area in the vicinity of and near the front of the Lyceum Building where the Marshals were stationed). He also offered advice on how to make the tear gas bombs ineffective, and otherwise complimented, encouraged and urged on the crowd of rioters to further protest and to keep up what they were doing, all of which resulted in continual opposition to duly constituted governmental and judicial authority including violation of the injunctive decrees heretofore referred to.

Therefore, each and all of the statements complained of by plaintiff herein are fair comment and are privileged.

* * *

V.

By way of further answer herein and adopting all the allegations heretofore made herein, this defendant, The Associated Press, denies that any malice was involved or intended on the part of this defendant in the publication of any one or all of the articles or dispatches complained of, but was occasioned only by an effort in good faith—actuated solely by a sense of duty growing out of the occasion—to report to its members and to the public what this defendant believed to be an accurate report of the plaintiff's activities in the Mississippi crisis, and to make fair comment thereon, all of which is privileged.

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

VI.

By way of further answer herein and adopting all of the allegations heretofore made herein, this defendant denies that it was or is guilty of any conduct which would authorize the allowance of any damages, punitive or otherwise, but would further say that the allowance of any damages herein would amount to a restraint and deterrent to the publication of news and the freedom of the press as required by the First and Fourteenth Amendments to the Constitution of the United States. The publications complained of were published and circulated by the defendant among the general public; the information contained therein is true; it concerns the plaintiff, a public figure, and was related to public affairs and matters of great public concern, and the publication was made so that the public should be informed, and the same was made in good faith and without malice, so that the same is privileged. Further, the allowance of any damages under and by virtue of any rule of law as applied by the courts of the State of Texas would be in violation of the foregoing Constitutional safeguards and would be constitutionally deficient for failure to permit freedom of speech and press which are guaranteed by the Constitution of the United States. The allowance of any damages herein also would be violative of the Constitution of the State of Texas which prohibits the abridgement of the freedom of the press in Article I, Paragraph 8 thereof.

APPENDIX C

Defendant's Motion to Disregard the Jury's Verdict, and for Judgment Notwithstanding Said Verdict, pp. 1 and 4 (Transcript, pp. 63 and 66)

IN THE

DISTRICT COURT OF

TARRANT COUNTY, TEXAS

17TH JUDICAL DISTRICT

No. 31741-C

EDWIN A. WALKER

vs.

ASSOCIATED PRESS

DEFENDANT'S MOTION TO DISREGARD THE JURY'S VERDICT AND FOR JUDGMENT NOTWITHSTANDING SAID VERDICT

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the defendant, Associated Press, and moves the Court to set aside and disregard the verdict of the jury and each and every finding therein, and to render judgment for the defendant and against the plaintiff notwithstanding such verdict, and as grounds therefor would respectfully show as follows:

* * *

Appendix C

Defendant's Motion to Disregard the Jury's Verdict, and for Judgment Notwithstanding Said Verdict, pp. 1 and 4 (Transcript, pp. 63 and 66)

16.

Notwithstanding the verdict of the jury, the Court should render judgment for the defendant because any judgment awarding money damages to plaintiff against defendant would constitute a restraint and deterrent to the publication of news and a restraint, deterrent and denial of the freedom of the press as guaranteed to defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

APPENDIX C

Defendant's Original Motion for New Trial, p. 1
(Transcript, p. 73)

IN THE

DISTRICT COURT OF
TARRANT COUNTY, TEXAS
17TH JUDICIAL DISTRICT
No. 31741-C

EDWIN A. WALKER

vs.

THE ASSOCIATED PRESS

DEFENDANT'S ORIGINAL MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the defendant Associated Press, after entry of judgment herein on August 3, 1964, and makes and files this its Orginal Motion for New Trial, and moves the Court to set aside the judgment heretofore rendered against it and to grant a new trial herein, upon the following grounds, to-wit:

1.

The Court erred in overruling the motion for instructed verdict made by defendant after plaintiff had rested.

2.

The Court erred in overruling the motion for instructed verdict made by defendant after both sides had rested.

3.

The Court erred in overruling Grounds 1, 2, 3, 5, 6, 7, 8, 9, 11, 12, 13, 16 and 17 of defendant's motion to disregard the jury's verdict, and for judgment notwithstanding said verdict.

APPENDIX C

Defendant's Amended Motion for New Trial, pp. 1 and 3 (Transcript, pp. 78 and 80)

IN THE

DISTRICT COURT OF

TARRANT COUNTY, TEXAS

17TH JUDICIAL DISTRICT

No. 31741-C.

EDWIN A. WALKER

vs.

THE ASSOCIATED PRESS

DEFENDANT'S AMENDED MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes defendant, The Associated Press, and with leave of the Court first had and obtained makes and files this its Amended Motion for New Trial, and would respectfully show as follows:

I.

The Court erred in overruling Grounds 1, 2, 3, 5, 6, 7, 8, 9, 11, 12, 13, 16 and 17 of Defendant's Motion to Disregard the Jury's Verdict and for Judgment Nothwithstand-

Appendix C

Defendant's Amended Motion for New Trial, pp. 1 and 3 (Transcript, pp. 78 and 80)

ing such Verdict for each and all of the reasons therein set forth, which said Grounds read as follows:

* * *

(16) Notwithstanding the verdict of the jury, the Court should render judgment for the defendant because any judgment awarding money damages to plaintiff against defendant would constitute a restraint and deterrent to the publication of news and a restraint, deterrent and denial of the freedom of the press as guaranteed to defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

APPENDIX C

Brief of Appellant The Associated Press in the Texas Court of Civil Appeals, pp. 1, 9 and 73-85

No. 16,624

IN THE

COURT OF CIVIL APPEALS

FOR THE SECOND SUPREME JUDICAL DISTRICT OF TEXAS
AT FORT WORTH

THE ASSOCIATED PRESS, *Appellant*

vs.

EDWIN A. WALKER, *Appellee*

FROM THE 17TH DISTRICT COURT OF
TARRANT COUNTY, TEXAS

APPELLANT'S BRIEF

* * *

POINTS OF ERROR

* * *

5.

The trial court erred in rendering judgment for plaintiff because defendant's news reports, made without malice, are protected from the claim of libel by the First and Fourteenth Amendments to the Constitution of the United States, and such judgment therefore abridges defendant's rights thereunder.

Appendix C

Brief of Appellant The Associated Press in the Texas Court of Appeals, pp. 1, 9 and 73-85

(Page 73-85)

* * *

FIFTH POINT OF ERROR (Restated)

The trial court erred in rendering judgment for plaintiff because defendant's news reports, made without malice, are protected from the claim of libel by the First and Fourteenth Amendments to the Constitution of the United States, and such judgment therefore abridges defendant's rights thereunder. (Germane to Ground I(16) of the Amended Motion for New Trial).

ARGUMENT AND AUTHORITIES

Wide-Open Debate—A Profound National Commitment

In a series of public statements, already quoted in this brief, General Walker appealed to the world at large to rise and stand by Governor Barnett in Mississippi. When we are thus solicited by radio and television to help defy a court order and are informed that the Supreme Court of the United States consists of anti-Christ conspirators who have betrayed the Nation, we are not to suppose that this is double-barreled insurrection and calumny of the most dangerous and irresponsible sort. It is only General Walker exercising his constitutional rights to say what he pleases about others.

Appendix C

Brief of Appellant The Associated Press in the Texas Court of Appeals, pp. 1, 9 and 73-85

But any comment on his activities provokes the indignant cry of "foul", and it is then that we are to forget and ignore the public battle of national controversy into which he charged, calling with caustic invective for others to follow, and are to concentrate instead on the wounds with which he says he emerged from it.

And it is just such a claim to unilateral privilege of expression that is repugnant to, and underscores the wisdom of, our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . ." *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A.L.R. 2d 1412; *Garrison* v. *Louisiana,* . . . . . U. S. . . . . , 13 L. Ed. 125, 85 S. Ct. . . . . .

In the *Times* and *Garrison* cases, supra, the Supreme Court of the United States in 1964 held that truth may not be the subject of either civil or criminal sanctions where a discussion of public affairs is concerned. The court recognized that erroneous statement is inevitable in free debate, that it must be protected if the freedoms of expression are to survive, and that only false statements made with a high degree of awareness of their probable falsity may be the subject of either civil or criminal sanctions.

In the *Garrison* case, the Supreme Court, in applying its decision in the *Times* case to a criminal libel conviction, said, at page 133:

> ". . . Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. And since . . . erroneous statement is inevitable in free debate, and . . . it must be pro-

Appendix C
Brief of Appellant The Associated Press in the Texas Court of Appeals, pp. 1, 9 and 73-85

> tected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive" . . .,' 376 U.S. at 271-272, 11 L. ed. 2d at 701, 95 ALR 2d 1412, only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government."

In the case at bar, there is no evidence of malice, and the trial court correctly so held. The court erred, however, in refusing to apply the *Times* rule and render judgment for defendant regardless of the jury findings as to the truth of the statements in question. The trial judge was of the view that the *Times* rule is limited to statements about public officials, and hence did not apply to the case at bar (Supp. Tr.). In this conclusion, we respectfully submit, the court erred.

The decision of the Supreme Court in *Garrison* v. *Louisiana*, rendered in November of 1964, was not before the trial court when it rendered judgment in the present action.

To be sure, the actual holding of the *Times* and *Garrison* cases applied to public officials since the persons alleged to have been libeled in those cases were public officials. It is manifest, however, from the reasoning underlying the decisions that they cannot be so limited. Moreover, to so restrict the *Times* and *Garrison* rule would create constitutional anomalies of the most serious kind and would, indeed, engender the very dangers that the rule was intended to avoid.

Appendix C

Brief of Appellant The Associated Press in the Texas Court of Appeals, pp. 1, 9 and 73-85

The touchstone of the *Times* and *Garrison* decisions was the premise that it is the purpose and philosophy of the First Amendment to insure free and uninhibited exchange of ideas on issues of public importance, even though such a freedom, like others, will result in some abuses. Quoting from Judge Learned Hand, the court in the *Times* case said that the First Amendment " 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.' " The court then quoted the "classic formulation" of the principle:

> " 'Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing

Appendix C
Brief of Appellant The Associated Press in the Texas Court of Appeals, pp. 1, 9 and 73-85

> majorities, they amended the Constitution so that free speech and assembly should be guaranteed.' "

Recognizing that "some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press," the court then quoted from an earlier opinion as follows:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of democracy."

In short, the holding of *Times* and *Garrison* is that, in the long run, freedom of expression on public matters is of overriding public importance regardless of the excesses and abuses that may occasionally result; and that the individual's claim for libel is pre-empted by the paramount public need for uninhibited debate on public issues.

Moreover, the court's heavy emphasis in the *Times* case on the opinion of the Kansas Supreme Court in *Coleman* v. *MacLennan*, 98 P. 281, leaves no doubt that the decision ex-

Appendix C

Brief of Appellant The Associated Press in the Texas Court of Appeals, pp. 1, 9 and 73-85

tends to all matters of great public concern. The court quoted with approval the following from the Supreme Court of Kansas:

> "In such a case the occasion gives rise to a privilege, qualified to this extent: any one claiming to be defamed by the communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes *matters of public concern, public men,* and candidates for office." 78 Kan. at 723.

In *Pauling* v. *News Syndicate Co.*, 335 F. 2d 659 (2 Cir. 1964), an action for libel, the court said, as an alternative ground for its holding, that although the public official is the strongest case for the constitutional compulsion of the *Times* privilege with respect to the discussion of matters of public importance and concern, a candidate for public office would seem an inevitable candidate for extension, and that once that extension was made, the participant in public debate on an issue of grave public concern would be next in line.

In its opinion, the court said, at page 671:

> "Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extension; if a newspaper cannot constitutionally be held for defamation when it states without malice, but cannot

Appendix C
Brief of Appellant The Associated Press in the Texas Court of Appeals, pp. 1, 9 and 73-85

> prove, that an incumbent seeking re-election has accepted a bribe, it seems hard to justify holding it liable for further stating that the bribe was offered by his opponent. Once that extension was made, the participant in public debate on an issue of grave public concern would be next in line; thus, as applied to the case in hand, if a newspaper could not be held for printing Dr. Pauling's charges that a member of the Atomic Energy Commission had 'made dishonest, untrue and misleading statements to mislead the American people' and that a United States Senator is 'the greatest enemy . . . the United States has,' as the New York Times case decided, one may wonder whether there would be sound basis for forcing it to risk a jury's determination that it was only engaging in fair criticism rather than misstating facts if it printed, falsely, but without malice, that in saying all this Dr. Pauling was following the Communist line."

In *Gilberg* v. *Goffi*, 251 NYS 2d 823, an action for libel, the rule of the *Times* case was applied to a mayor's law partner, who was neither an officeholder nor a candidate for office, but who had entered a public controversy as to whether a municipal code of ethics was needed to bar the mayor and his law firm from practicing law in the city court.

In *Pearson* v. *Fairbanks Publishing Co., Inc.*, (Superior Court of Alaska. Fourth District, No. 10,209), the action was to recover damages for libel. The alleged libel was the charge that the plaintiff, a newspaper and radio columnist, was the "Garbage Man of the Fourth Estate."

Appendix C

Brief of Appellant The Associated Press in the Texas Court of Appeals, pp. 1, 9 and 73-85

The court, in taking note of the *Times* decision and holding that the publication complained of was not actionable, said, in an opinion not yet published, that "Drew Pearson, a public figure and internationally known newspaper and radio columnist of no mean proportion, should occupy the same standing in the law of libel as Senator Gruening whose cause he was publicly supporting."

In the case at bar, there can be no doubt that the question of school integration that came to a head in the Mississippi crisis was a matter of grave national controversy and concern. It was one of the most dominant and widely debated issues of this century. In the *Times* case, the Supreme Court referred to the integration question as "one of the major public issues of our time . . .", (at 701). This is also conclusively established in the record. The plaintiff was a national public figure (S.F. 331, 486, 516) and a recent candidate for public office. He knew that the question of integration was a matter of national controversy and interest (S.F. 759); he knew that his going to Mississippi would create considerable publicity (S.F. 922); he sought that publicity; he knew that there was an explosive situation on the campus and that feelings were high in Mississippi (S.F. 922); and that the Chief Executive of the State was openly obstructing the mandate of the Fifth Circuit Court. His repeated television and radio addresses called attention to himself and solicited support for the cause that he championed. That he deliberately and publicly became part and parcel of the controversy is not open to question.

Appendix C

Brief of Appellant The Associated Press in the Texas Court of Appeals, pp. 1, 9 and 73-85

If the *Times* decision applies at all to matters of public concern and participants in debate on public issues, it clearly applies to plaintiff and his conduct in Mississippi. The publications complained of in the case at bar were not mere gossip about the plaintiff in some private capacity. The defendant was reporting the crucial events at Oxford, and plaintiff's voluntary presence brought him within the area of national controversy. As we have pointed out on pages 18-20 of this brief, prior to September 30, 1962 the U.S. Court of Appeals had rendered its judgment ordering the admission of James H. Meredith to the University of Mississippi. In furtherance thereof an injunction had been issued enjoining the school officials and all persons acting in concert with them, as well as all persons having knowledge of such decree, from interfering with Meredith's admission.

Despite these restraining orders, Governor Barnett continued to oppose the admission of Meredith to the University.

The plaintiff's declared purpose on the night of the riot —September 30, 1962—was to stand shoulder to shoulder with Governor Barnett in opposing the orders of the courts. He was in Oxford to support the Governor's position, and he occupied the same position from the standpoint of the law of libel as Governor Barnett, whose cause he was publicly supporting.

It would be a constitutional anomaly having neither substance nor shadow of basis in reason to hold on the one hand that Governor Barnett is within the *Times* rule, which

Appendix C
Brief of Appellant The Associated Press in the Texas Court of Appeals, pp. 1, 9 and 73-85

he clearly is, and yet to hold on the other hand that those who publicly rise to stand beside him, seeking with equal vigor and effect to rally public support for his cause, are not. Logically, the Constitutional protection, if it is to exist at all and have any fairness about it, must extend to the *area of public debate and to those who participate in it.*

If the *Times* rule were to be limited to public officials, a national press columnist or TV commentator could state falsely, but without malice, that a public official was a thief and clearly come within the ambit of the rule, but anyone who dared to enter the debate by publicly suggesting that the columnist or commentator was a liar in so stating, would be denied the same protection. This is scarcely wide-open debate. A defeated presidential candidate could spend the ensuing four years rallying public support by defamatory statements about the incumbent and enjoy the protection of the rule, but those who would criticize the challenger would have to do so without it. Such an anomaly can hardly be said to comport with the principle of uninhibited debate.

The Court can well imagine other examples, such as labor leaders, political party leaders, campaign managers, national magazines, and countless others who wield broad public power and have wide public support for themselves and those that they champion, but who hold no public office. Surely it would be unthinkable to hold that utterances made *about* them are to enjoy less protection than the clamor that *they* are free to utter about public officials under the *Times rule.* If the people are to be free to criticize the Government and those who comprise it, they must be free to

criticize the critics within the same latitude and under the same rule of law. To hold otherwise would create an imbalance of the freedom of expression and could conceivably result in an atmosphere in which an administration could be toppled by a rising Castro who, by virtue of holding no office, enjoyed freedoms of expression about the Government that were denied to those who would criticize him.

The repressing effect of a half million dollar award upon freedom of expression is so patent, the inhibiting effect upon the presentation of conflicting and controversial political argument so plain, and the punishment for such presentation so burdensome and oppressive that this Court may not, consistent with the First Amendment, permit its imposition. As the court said in the *Times* case:

> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."

Cf. *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963); *Marcus* v. *Search Warrant,* 367 U.S. 717 (1961); *Shelton* v. *Tucker,* 364 U.S. 470 (1960); *Speiser* v. *Randall,* 357 U.S. 513 (1958).

Finally, on this point, the import of the trial court's opinion is that though free press is important, so is accuracy, and that the need for accuracy "imposes a great duty and responsibility" on the press, in default of the discharge of which it forfeits its constitutional protection. (Supp. Tr.) We were unable to ascertain any rational basis for distingu-

Appendix C
Brief of Appellant The Associated Press in the Texas Court of Appeals, pp. 1, 9 and 73-85

ishing between "irresponsibility"—short of actual malice—in reporting on public officials and in reporting on other participants in public debate on public issues.

Moreover, while accuracy and responsibility of reporting are unquestionably desirable, they are not prerequisites to First Amendment protection. As the court said in *New York Times*:

> "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth, whether administered by judges, juries, or administrative officials—and especially not one that puts the burden of proving truth on the speaker. * * * The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.' "

The trial court's thesis would be persuasive if the press operated by license of the Government. The argument, however, overlooks the fact that we are concerned here with basic and fundamental constitutional rights that may not be forfeited, like a taxicab franchise, upon a supposed showing that a "great duty and responsibility" have not been discharged.

APPENDIX C

Reply Brief of Appellant The Associated Press, pp. 1, 6-8 and 19-24

No. 16,624

IN THE

COURT OF CIVIL APPEALS

FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

AT FORTH WORTH

THE ASSOCIATED PRESS, *Appellant*

vs.

EDWIN A. WALKER, *Appellee*

REPLY BRIEF FOR APPELLANT

May It Please the Court:

* * *

Among other irrelevances, plaintiff seeks to bolster his argument on this and other points by revealing to the Court that defendant is a corporation that makes money, a state of affairs something less, we believe, than sinister, even if it were accurate, which it is not. Should the Court be interested in the organization and financial situation of the defendant, the cases in the margin explain that it is a member-

Appendix C
Reply Brief of Appellant The Associated Press, pp. 1, 6-8 and 19-24

ship corporation, whose members are the newspapers that subscribe to its services, and that it is not operated for profit.[1]

The point is really immaterial, however, because even if The Associated Press were a profit making corporation, that would have absolutely no bearing on any of the points involved in this litigation. Although the point plaintiff is trying to make is admittedly fuzzy in this regard, apparently plaintiff is attempting to infer that anyone who makes a profit from distributing news must be denied both the fair comment defense and the constitutional protection. Though, of course most everything that is written or published, including most of plaintiff's speeches, is for profit and, indeed, some publications even enjoy copyright protection, those facts have never had any bearing on the fair comment defense and the constitutional protection. Newspapers are sold like any other commodity, yet even plaintiff concedes that they are protected by Article 5432 and the Constitution. Just how or why it is the plaintiff regards The Associated Press as being in some unique category we cannot understand, and plaintiff does not explain. As the Supreme Court of the United States said in *New York Times* v. *Sullivan*, 376 U. S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710:

> "That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold."

---

[1] *National Labor Relations Board* v. *Associated Press*, 85 F. 2d 56, affirmed 301 U. S. 103, 81 L. Ed. 953; *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, 81 L. Ed. 183; the Opinion of the District Court in *United States* v. *Associated Press*, 52 F. Supp. 362, which was affirmed in 326 U. S. 1, 89 L. Ed. 2013; and *International News Service* v. *Associated Press*, 248 U. S. 215, 63 L. Ed. 211.

Appendix C
Reply Brief of Appellant The Associated Press,
pp. 1, 6-8 and 19-24

So, in the instant case, the fact, if it be a fact, that The Associated Press was paid for its news releases is as immaterial as is the fact that newspaper reporters are paid by the newspaper, or that the author of a magazine article is paid by the magazine.

If, as plaintiff would have it (Brief 3), defendant is in the same category as the supplier of printing ink to the newspaper, then of course defendant, like the ink supplier, would not be responsible for the publication by the newspaper of which plaintiff complains.

* * *

The Constitutional Protection

In his argument on the constitutional question, plaintiff continues his insistence that the defendant is without the scope of the First and Fourteenth Amendment protection because it receives compensation for its news releases. This point has already been discussed earlier in this reply, and we will not here elaborate on it beyond pointing out that the fact that news may be treated as a commodity, for some purposes at least, is as irrelevant here as is the fact that newspapers, books, and magazines are also commodities.

At page 47 of his brief, appellee reminds us again that The Associated Press is not engaged in the publication of anything, which again is completely irrelevant to the constitutional protection that is afforded to free expression of thought. That The Associated Press is the author, rather than the publisher, of the two reports in question has nothing to do with the constitutional questions involved.

Appendix C
Reply Brief of Appellant The Associated Press, pp. 1, 6-8 and 19-24

In our main brief, we attempted to analyze the *Times* and *Garrison* cases[2], and we predicated our argument upon the *reasoning* employed by the court in both cases. As we there pointed out, the underlying basis for both decisions was the premise that the purpose and philosophy of the First Amendment was to insure free and uninhibited exchange of ideas on issues of public importance and concern.

In response, plaintiff merely extracts from each opinion every reference to public officials and official conduct and parrots them in his brief. Plaintiff, of course, is entitled to argue that both decisions are inapplicable here, but the argument finds no support in the fact that the phrases "public officials" and "official conduct" appear frequently in the opinions. Such an argument is roughly analogous to contending that a case involving a super market has no application to a department store because of the frequent references in the opinion to super markets. We respectfully submit that one must at least examine the *reasoning* in any case to determine its applicability in another, and that plaintiff in this case has done nothing more than emphasize that public officials were involved in both the *Times* and *Garrison* cases, which hardly requires the three pages of brief that plaintiff devotes to it.

Plaintiff not only utterly ignores the rationale and the basis for the holdings in both cases, he affirmatively misstates the holding in *Garrison* when he states on page 51 of his brief that the court there held that "neither the court nor

---

[2]*New York Times Co.* v. *Sullivan*, 376 U. S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A. L. R. 2d 1412; *Garrison* v. *Louisiana*, ... U. S. ...., 13 L. Ed. 125, 85 S. Ct.

Appendix C
Reply Brief of Appellant The Associated Press, pp. 1, 6-8 and 19-24

the Constitution protected libelous publications, even in the case of public officials." It is obvious from a cursory inspection of either opinion that the court in each case held that the Constitution does protect libelous publications made about public officials, and indeed that that was the precise holding in each case. The only limitation suggested by the majority in both cases was that the Constitution does not protect *malicious* false statements, i.e., "false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* . . ."; *Garrison* at page 133.

Moreover, in neither case did the court "draw the line" at public officials, as plaintiff tells us at page 53 of his brief, nor was the constitutional protection "strictly limited" to public officials, as plaintiff asserts at page 52 of his brief. Obviously, the court was not required to draw any lines because only public officials were involved in both cases. Courts draw lines in cases that involve situations determined to be beyond the scope of the concept involved.

We respectfully submit that this Court cannot read the opinions in *Times* and *Garrison*, and particularly the thorough and painstaking analysis of the historical background of free speech and press, without being deeply impressed with the Supreme Court's zealous determination to insure the preservation of one of the most fundamental and sacred safeguards that forms part of the very bedrock of this Republic. It is scarcely conceivable that one could study those opinions and find no more substance, no more depth, and no more principle in them than plaintiff professes in his brief to have discovered. That which plaintiff has missed

Appendix C
Reply Brief of Appellant The Associated Press, pp. 1, 6-8 and 19-24

has not escaped the attention of the courts in *Pauling v. News Syndicate Co.*, 335 F. 2d 659 (2 Cir. 1964), *Gilberg v. Goffi*, 251 NYS 2d 823, and *Pearson v. Fairbanks Publishing Co., Inc.* (not yet reported), all cited in our main brief.

The *Times* and *Garrison* opinions expound the Supreme Court's recognition of the absolute necessity for free and uninhibited exchanges of ideas on matters of public concern, particularly those involving government and the conduct of government, no matter how erroneous the ideas may be, in the absence of the known and deliberate lie. Stable self-government depends upon the freedom to comment on matters of public concern and persons who attempt to influence the course and destiny of the government, whether they be public officials or public interlopers. Such a concept does not and could not embrace baseball players, Beatles, and Fat Stock Show winners, as plaintiff suggests at page 52 of his brief. Being merely in the public eye, as plaintiff puts it, is not the same at all as attempting publicly to rally public support in a controversy involving the very essence of the respective powers and authorities of the United States, a State and the Federal Courts.

Obviously, a public official by virtue of his office can and does have a direct influence upon the government, but to contend that public officials are the only ones in that position is to ignore reality.

As the Second Circuit Court of Appeals observed in the *Pauling* case, it would be anomalous to hold that a newspaper which reported falsely, but without malice, that a public official had been bribed would not be liable for de-

Appendix C
Reply Brief of Appellant The Associated Press, pp. 1, 6-8 and 19-24

famation to the official, but would be liable to the person who reportedly bribed him.

In the instant case, plaintiff summoned the world at large to join plaintiff in rising to a stand beside Governor Barnett. There could be no possible reason or consistency whatever, and plaintiff suggests none, for holding that statements about Governor Barnett are within the *Times* rule, but that statements about those who rise to stand beside him are not. The object in either case is the same, the solicitation of public support is the same, the impact upon public opinion is the same, and the potential influence and effect on the outcome of the controversy is the same.

To illustrate the point we are making, suppose that the Governor of a State should determine that the State would secede from the Union. Surely private citizens who publicly solicited and sought to raise armies in support of such a movement would be subject to the same law of libel as the Governor.

Perhaps we have overlabored the point, but we trust that this Court will recognize that there is more involved here than plaintiff's assertion that we are contending for some sort of license to "peddle prevarication with impunity" (Brief 56), or that "anyone can be vilified for free". We are urging this Court's serious consideration of the constitutional thesis which applies the same law of libel to those who actively and publicly assist public officials as is applied to the public officials.

APPENDIX C

Motion of Appellant The Associated Press for Rehearing in the Texas Court of Civil Appeals, pp. 1 and 3

No. 16,624

IN THE

COURT OF CIVIL APPEALS

FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

AT FORT WORTH

THE ASSOCIATED PRESS,
Appellant,

vs.

EDWIN A. WALKER,
Appellee.

From the 17th District Court
of Tarrant County, Texas

APPELLANT'S MOTION FOR REHEARING

TO THE HONORABLE COURT OF CIVIL APPEALS:

Now comes The Associated Press, the appellant in the above entitled and numbered cause, and respectfully moves the Court to set aside its judgment and opinion rendered herein on the 30th day of July, 1965, and to grant appellant

Appendix C

Motion of Appellant The Associated Press for Rehearing in the Texas Court of Civil Appeals, pp. 1 and 3

a rehearing, and upon such rehearing to reverse the judgment of the District Court and render judgment for appellant in all respects, or, in the alternative, to remand the case for a new trial, and as grounds therefor respectfully says:

* * *

The Court of Civil Appeals erred in overruling Appellant's Fifth Point of Error, which reads as follows:

> "The trial court erred in rendering judgment for plaintiff because defendant's news reports, made without malice, are protected from the claim of libel by the First and Fourteenth Amendments to the Constitution of the United States, and such judgment therefore abridges defendant's rights thereunder."

APPENDIX C

Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

No. A-11,069

IN THE

SUPREME COURT OF TEXAS

THE ASSOCIATED PRESS,
Petitioner,

vs.

EDWIN A. WALKER,
Respondent.

APPLICATION FOR WRIT OF ERROR

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner, The Associated Press, respectfully submits this Application for Writ of Error to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Forth Worth, to correct errors of law in the judgment and opinion of said Court in Cause No. 16,624, styled The Associated Press, Appellant v. Edwin A. Walker, Appellee, wherein the Court of Civil Appeals affirmed the judgment of the 17th District Court of Tarrant County, Texas.

Nomenclature

In this Application the parties will be designated either by name or as they appeared in the trial court.

Appendix C

Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

Statement of The Case

The *per curiam* opinion of the Fort Worth Court, affirming a half million dollar judgment against defendant, correctly states the nature and the result of this libel suit, and it accurately quotes from *Texas Jurisprudence* and the *Texas Law Review.* It ignores virtually all of the facts, most of which are undisputed, and in so doing fails even to recognize, much less analyze, the serious Federal Constitutional question that was presented. The length of this Application is due in large part to the necessity for setting out the undisputed facts that are omitted in the opinion of the court below.

The two news stories in question are correctly set forth in the opinion below. They were prepared by defendant and published by the Fort Worth Star-Telegram. They described plaintiff's participation in a riot of several thousand persons that occurred during most of the evening of Sunday, September 30, 1962, and the pre-dawn hours of the following Monday, on the campus of the University of Mississippi, at Oxford, in opposition to the efforts of United States marshals to secure the enrollment of a Negro in that university, pursuant to the mandate of the United States Court of Appeals for the Fifth Circuit.

The plaintiff's presence in the midst of the riot for more than four hours is undisputed, as is also the incessant radio and television appeal with which he heralded his coming and summoned 500,000 volunteers to help protect the Nation against enforcement of the law of the land by assisting the Governor of Mississippi in pursuing a course

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

that had already led him, to plaintiff's knowledge, in contempt of the Fifth Circuit Court for having personally and physically obstructed the execution of its mandate.

In this Application we shall demonstrate, among other things, that the evidence conclusively established, as a matter of law, (1) that both statements* were substantially true; (2) that both were fair comment, and thus privileged by applicable Texas statutes; and (3) that in any event the defendant's news releases describing, as they did, a state of affairs in Mississippi that was of grave national interest and concern, involving issues of the utmost public importance, are protected by the First and Fourteenth Amendments to the Constitution of the United States against the claim of libel by this particular plaintiff, who the evidence conclusively establishes was, and for considerable time had been, a vociferous, publicity-seeking, prominent political figure and who, with clamorous public fanfare in advance, deliberately injected himself and his sentiments into the fray in Mississippi and into the limelight of public scrutiny that he knew was focused upon it.

* * *

Points of Error Relied Upon

1.

The News reports here involved, made without malice, concerning matters of grave national concern, are protected from the claim of libel by the First and

*i.e., the "charge" and "command" statements as quoted in the opinion below.

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

Fourteenth Amendments to the Constitution of the United States, and the judgment herein therefore abridges defendant's rights thereunder; and the Court of Civil Appeals erred in holding to the contrary.

* * *

First Point of Error Restated

1.

The news reports here involved, made without malice, concerning matters of grave national concern, are protected from the claim of libel by the First and Fourteenth Amendments to the Constitution of the United States, and the judgment herein therefore abridges defendant's rights thereunder; and the Court of Civil Appeals erred in holding to the contrary. (Germane to Ground 5 of Defendant's Motion for Rehearing.)

Preliminary Statement

Ordinarily, accepted briefing practice would dictate that a resume of the pertinent facts should precede the argument and authorities, because the Court, being generally familiar with the law, can readily determine the nature of the contention from the point of error, and should first have the facts in mind before attempting to apply the law.

Here, however, the point of error raises questions involving Federal Constitutional limitations in the field of libel under the First and Fourteenth Amendments that have

been announced only recently by the Supreme Court of the United States, and accordingly this is a case of first impression in this Court. In addition, we have here the rare instance in which the same point has been decided by another court in a case involving the same plaintiff and the same subject matter.

We believe, therefore, that the Constitutional issue that we presented in the courts below, and are raising here, can best be demonstrated at the outset by quoting substantial portions of the opinion of the United States District Court, Western District of Kentucky, in *Walker* v. *Courier-Journal et al*, . . . F. Supp. . . , decided September 23, 1965.* We think more extensive quotation than usual is warranted here and will be helpful, because the case is not yet reported, and also because it is more than directly in point—it is virtually the same case, except insofar as the question of actual malice is concerned. The defendant here was not a party to that case, but the news reports are substantially the same. We respectfully ask the Court's indulgence in this departure from ordinary practice, believing it will be helpful to the Court in understanding the issue. Argument and additional authorities will follow.

The following is quoted from the opinion of the Court in *Walker* v. *Courier-Journal et al:*

> "This cause comes on before the Court on the Defendants' Motion to Dismiss the Plaintiff's Complaint, as amended.

*The entire opinion is reproduced in the Appendix.

Appendix C

Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

"On September 30, 1963, the Plaintiff, Edwin A. Walker, a former Army Major General, filed this action for actual and punitive damages for libel in the sum of Two Million Dollars, against the Defendants, Courier-Journal and Louisville Times Company and WHAS, Inc., Kentucky corporations, with their principal places of business in Louisville, Kentucky. Jurisdiction of the Court over this action is fixed by USC Title 28, Paragraph 1332.

"The Defendant corporations, on October 1, 1962, October 2, 1962 and October 3, 1962, published in their newspapers and/or broadcast over their radio and television facilities, various news items or stories concerning the rioting on the campus of the University of Mississippi, in the City of Oxford, Mississippi, which said published matter had been received by Defendants from national news gathering agencies to which Defendants were subscribers.

"The news items or stories so published and complained of by the Plaintiff stated in substance, that the Plaintiff, Walker, had led a charge of rioters against United States Marshals who were present on the University of Mississippi campus carrying out the orders of the United States Courts requiring integration of enrollment of whites and negroes at said University. Plaintiff, Walker, alleged that such items imputed to him that he was a 'trouble maker', that he was 'participating' in the occurrences taking place in Oxford, all in the context

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

used of inciting of the students to riot, and that the publication reflected libelously on the honor, character and reputation of the Plaintiff.

"This Court has considered the briefs and memoranda submitted by counsel for the parties and taking judicial notice of the public events relating thereto which were widely reported throughout the Nation and are matters of common knowledge, and further treating as true (for the purpose of passing upon this Motion to Dismiss) the factual allegations of the Complaint, as amended, arrives at the following conclusions which are the basis of its final Order entered herein.

"Following the filing of this action the Supreme Court of the United States handed down its Opinion in *New York Times Company* v. *Sullivan,* 376 U.S. 254 (October Term, 1963) wherein said Court in legal effect federally preempted the law of libel in matters of 'grave national concern' involving 'public officials' with the announced doctrine that

> '. . . Constitutional guarantees require, we think, a Federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was or not.'

Appendix C

Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

"There can be no question but that the serious occurrences at the University of Mississippi wherein the State of Mississippi and the Federal Government were locked in conflict as to the educational integration of the races was a matter of 'grave national concern.' The Supreme Court of the United States has classified the integration struggle as 'one of the major political issues of our time.'

"Thus, it can be seen that had the Plaintiff, Walker, been a 'public official' at the time of this occurrence, this Court's task would have been automatically relegated to a decision *only* of the *one issue* of whether or not the Defendants herein had published the statements attributed to them with 'actual malice', that is, with knowledge that the statements were false or with reckless disregard of whether or not they were false.

"However, the matter is not so simple, for this Court notes with significance that in laying down the doctrine of 'actual malice' in the *Times* case, the Supreme Court quoted with approval from the case of *Coleman* vs. *McLennan*, 78 Kans. 711, 98 P. 281 (1908) as follows:

> 'This privilege extends to a great variety of subjects and includes matters of public concern, *public men* and candidates for office.' (Emphasis added)

and in conclusion the Court stated:

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

> 'We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable.' (Page 283)

"In connection with the last above quoted language, the Supreme Court included a footnote to its Opinion (Footnote 23) in part, as follows:

> 'We have no occasion here . . . to specify categories of persons who would or would not be included.'

"From this language I believe the Supreme Court of the United States has served clear notice that the broad Constitutional protections afforded by the First and Fourteenth Amendments will not be limited to 'public officials' only, for to have any meaning the protections must be extended to other categories of individuals or persons involved in the area of public debate or who have become involved in matters of public concern. If the Supreme Court intended to limit its holdings to 'public officials' only, *then why Footnote 23?* I subscribe that Footnote 23 is of vast importance in understanding the intended scope of the Supreme Court's Opinion, for it is a departure from the Court's traditional rule of basing its decision on the narrowest Constitutional grounds and is interpreted by this Court as

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

giving special significance to the broad language adopted in arriving at its decision.

"The Plaintiff, Walker, is of course not a 'public official' within the commonly accepted meaning of the words. However, he was, as he identifies himself in his own Complaint, a person of 'political prominence.' This Court takes judicial notice that Plaintiff Walker's public life is generally well known to the people of this Nation, that he was the subject of nationwide news reports while on duty as an Army General and also as a candidate for Governor of Texas, and that he has in the past made vigorous public announcements on matters of public concern. Plaintiff was, by his own choosing, present in Oxford, Mississippi, on the occasion of the turmoil after announcing on radio and television his intention to be present there and having called upon others to join with him there in support of his publicly stated position on the matters of public concern there in issue.

"Had not Plaintiff thereby become a 'public man'? Could he not have reasonably foreseen that his being a person of 'political prominence' his presence in Oxford would be taken cognizance of by the press? Had not Walker interwoven his personal status into that of a public one whereby he would become the subject of substantial press, radio and television news comment; thus magnifying the chance that his activities would be 'erroneously' reported? This Court so believes.

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

"I therefore reach the inescapable conclusion that the protective 'public official' doctrine of 'actual malice' announced in *Sullivan* v. *New York Times* is in common reason and should be applicable to a 'public man' as well, and that the Plaintiff, Walker, was such a 'public man' under the circumstances involved here. 'Public men are, as it were, public property.'

"My application of the doctrine of *New York Times* v. *Sullivan* to the facts here in issue finds authority not only in the logical dictates of Footnote 23 discussed above, but in the reasoning and philosophy underlying the Times Opinion and in the critical discussion in legal commentaries and recent decisions of other courts. The decision of Judge Friendly in *Pauling* v. *News Syndicate Company,* 335 F. 2d 659 at 671 (2d Cir. 1964), favorably presages the result here. See also *Gilberg* v. *Goffi,* 251 N.Y.S. 2d 823 (1964); *Pearson* v. *Fairbanks Publishing Co.,* (Unreported, Superior Ct. of Alaska, 4th District, Nov. 25, 1964); and Pedrick, *Freedom of the Press and the Law of Libel,* 49 Cornell L.Q. 581, at 592 (1964); 9 Vill. L. Rev. 534 (1964).

"I adopt this position with full understanding of the fact that by such extension of the scope of word meaning I am perhaps 'plowing new ground' in legal effect, but also with the accompanying conviction that not to do so would negate the spirit of the

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

Times Opinion which I believe to be a '. . . profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open . . .' Public debate cannot be 'uninhibited, robust and wide open' if the news media are compelled to stand legally in awe of error in reporting the words, and actions of persons of national prominence and influence (not 'public officials') who are nevertheless voluntarily injecting themselves into matters of grave public concern attempting thereby through use of their leadership and influence, to mold public thought and opinion to their own way of thinking. If any person seeks the 'spotlight' of the stage of public prominence then he must be prepared to accept the errors of the searching beams of the glow thereof, for only in such rays can the public know what role he plays on the stage of public concern—often, regretfully, a stage torn in the turmoil of riot and civil disorder, whereon error in reported occurrence is more apt to become the rule rather than the exception.

"This is particularly so here where open riot and turmoil with accompanying destruction of property, injuries and death turned portions of the University of Mississippi campus into a strife beset no man's land through the dark hours of the night."

The Federal Court then proceeded to consider the question of the existence of actual malice on the part of the defendants and, concluding that there was none, dismissed the complaint with prejudice.

Appendix C

Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

In marked contrast to the logical and analytical treatment of this serious, and we believe determinative, Constitutional question by the Federal Court in the above case is the opinion of the Fort Worth Court, wherein that court, presented with the same argument, authorities and set of facts, took no apparent notice of the significant, recent holdings of the Supreme Court of the United States, but resurrected instead, as the basis for its summary disposal of the question, a 1929 Law Review article written by a tort professor on the subject of fair comment. The critical facts of which the Federal Court took judicial notice upon motion to dismiss were not noticed at all by the Fort Worth Court, though they were undisputed in the record before it. This signal failure of the Texas intermediate court to come to grips with a crucial and timely Constitutional question requires, we respectfully submit, that this Court grant the writ of error upon the basis of the undisputed facts and the authorities that now follow.

The Undisputed Evidence

Background of the Mississippi Crisis

On June 25, 1962, the United States Court of Appeals for the Fifth Circuit, reversing the District Court for the Southern District of Mississippi, directed the lower court to issue an injunction compelling the admission of James H. Meredith, a Negro, into the University of Mississippi. *Meredith* v. *Fair,* 305 F. 2d 343. The history of that litigation is set out in some detail in the opinion by Judge Wisdom. On July 17 the mandate of the Circuit Court issued,

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

and on July 18 Judge Cameron of that Court signed an order staying the execution and enforcement of the mandate. (Def. Ex. 3).

On July 27, 1962, the Fifth Circuit Court entered an order vacating the stay order theretofore signed by Judge Cameron, and recalling the mandate for the purpose of clarifying it by amending it to provide that the injunction be issued *forthwith* by the District Court compelling the immediate admission of Meredith to the University (Def. Ex. 3).

On September 10, 1962, Associate Justice Hugo L. Black of the Supreme Court of the United States entered an order which (1) vacated Judge Cameron's stay order of July 18, as well as subsequent stay orders of July 28, July 31, and August 6, 1962, by the same circuit judge, and (2) ordered that the school officials be enjoined from preventing the enforcement of the Fifth Circuit's mandate (Def. Ex. 4). On September 13, 1962, the District Court for the Southern District of Mississippi, pursuant to the mandate of the Fifth Circuit and the mandate of Mr. Justice Black, granted permanent injunction commanding the immediate admission of Meredith into the University and enjoining the school officials from interfering with his admission (Def. Ex. 5).

On September 28, 1962, the Fifth Circuit Court, sitting *en banc,* rendered a judgment holding Ross R. Barnett, the Governor of Mississippi, in civil contempt of that court, and in the judgment recited findings of fact to the effect (1) that since the issuance of the injunction on September 13,

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

1962, Ross R. Barnett, as Governor of the State of Mississippi, had issued a series of proclamations calling upon all officials of the State to prevent and obstruct the carrying out of the court orders; (2) that on September 25, 1962, the Fifth Circuit Court had entered temporary restraining orders restraining Barnett from interfering with or obstructing the court's order and the injunction of the District Court; (3) that at approximately 4:30 P.M. on September 25, 1962, the said Barnett, having full knowledge of the Fifth Circuit Court's temporary restraining orders, had confronted Meredith when he sought to enter the office where he was to enroll, had deliberately prevented him from entering, and had told him that his application for enrollment was denied by Barnett; and (4) that on September 26, 1962, Meredith sought to enter the campus of the University of Mississippi at Oxford, where he was denied entry by the Lieutenant Governor of the State of Mississippi, acting pursuant to the instructions and under the authorization of Governor Barnett (Def. Ex. 6).

According to the plaintiff's testimony and that of his witnesses, Governor Barnett, despite the restraining orders and the contempt judgment, was continuing to oppose the entry of Meredith into the University at the time of the riot on the campus, and his instructions to that effect, directed to the local sheriffs and the Mississippi Highway Patrol, continued in force (S.F. 840-841). According to plaintiff's evidence, the orders of the Fifth Circuit and the actions of Governor Barnett in opposition thereto were widely discussed (S.F. 759) and were known to plaintiff (S.F. 760-762, 809-810), and the integration question was a subject of national interest and national controversy (S.F. 759).

Appendix C

Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

Background of General Walker

According to the testimony of the plaintiff: He is a graduate of the United States Military Academy (S.F. 730, 734), and, until his resignation from the Army in 1961, he was a career soldier, having risen to the rank of Major General (S.F. 734). In 1957 he commanded the federal troops that were called into Little Rock, Arkansas, by President Eisenhower to enforce the integration of the Little Rock High School, as ordered by the Federal Courts (S.F. 611, 739). In 1959 he was ordered to Germany to assume command of the 24th Infantry Division (S.F. 617). While in Germany he was involved in an incident that resulted in his receiving national publicity (S.F. 617). He was relieved of command, and an investigation was conducted, which resulted in neither charges nor punishment (S.F. 620). Thereafter, the Army wanted him to retire, but ininstead he resigned (S.F. 740). By resigning, instead of retiring, he forfeited benefits amounting to approximately $15,000 per year (S.F. 626, 740). His purpose in resigning, thereby losing his retirement benefits, was to be able to speak out on matters of public importance and to be free to say whatever he chose without any strings attached (S.F. 741). At the time of his resignation in the fall of 1961 he received considerable publicity concerning his resignation and the events leading up thereto (S.F. 743). He decided to speak and talk to people, and he expected to receive some kind of remuneration for his speaking engagements (S.F. 743).

Appendix C

Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

His first speech after leaving the Army was in Dallas in December, 1961, for which he received remuneration (S.F. 744, 745). Since then he has been making speeches all over the country and there is a constant demand on his time for speaking engagements (S.F. 745).

He has been a member of the John Birch Society since 1958 or 1959 (S.F.749). Since his resignation from the Army he has also done a good deal of writing, and he sells what he writes (S.F. 749). He and another person operate the American Eagle Publishing Company in Dallas, which has some 250 or 300 regular subscribers, and the publications are sent to others who plaintiff feels might be interested (S.F. 750-751). His followers include an organization known as "Friends of Walker" throughout the Nation, and some of these groups make financial contributions to him (S.F. 751-752).

In the spring of 1962 he announced his candidacy for Governor of Texas and made an extensive campaign, receiving broad press coverage concerning his ideologies and ideas about the governorship (S.F. 752-753). Although the news media does not always print everything he has to say, he has been able, basically, to get press conferences whenever he wanted them. (S.F. 758).

Appendix C

Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

General Walker and the Mississippi Crisis

(The Crisis Did Not Come to Him)

In the latter part of September, 1962, as it became apparent that a crisis was developing over the admission of Meredith to the University, General Walker began to move. From his home in Dallas on Wednesday, September 26, 1962, he issued over Radio Station KWKH at Shreveport, Louisiana, the following statement to the world at large:

> **"It is time to move. We have talked, listened, and been pushed around far too much by the anti-Christ Supreme Court. Rise . . . to a stand beside Governor Ross Barnett at Jackson, Mississippi. Now is the time to be heard. Ten thousand strong from every State in the Union. Rally to the cause of freedom. The Battle Cry of the Republic. Barnett, Yes! Castro, No! Bring your flag, your tent, and your skillet. It's time. Now or never. The time is when and if the President of the United States commits or uses any troops, Federal or State, in Mississippi.**
>
> **"The last time—in such a situation—I was on the wrong side. That was in Little Rock, Arkansas in 1957 and 1958. This time I am out of uniform and I am on the right side. And I will be there." (S.F. 778-780; Def. Ex. 7).**

His selection of the Shreveport station was no happenstance. Broadcasts from the station reached over into Mississippi. (S.F. 834).

Appendix C

Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

The next night, September 27, 1962, General Walker appeared on television at his home in Dallas and reiterated substantially the same statement as quoted above (S.F. 787). On that occasion, in addition to the prepared text the following colloquy occurred between General Walker and the interviewer:

Interviewer:

"General, if forces go, will you lead this force?"

General Walker:

"This is a cause for freedom. This is Americans, patriotic Americans, from all over the Nation. It is a movement for freedom. And I will be there. Rise to a stand beside Governor Barnett at Jackson, Mississippi. Now is the time to be heard. Thousands strong from every State in the Union. Rally to the cause of freedom." (S.F. 787-788)

The next evening, September 28, 1962, over Radio Station WNOE of New Orleans, Louisiana, he asserted that there is no law that requires integration (S.F. 801), and he reported that he had been swamped with telephone calls from persons offering help and assistance and notifying him that people were moving to Mississippi to assist in any way possible (S.F. 802). Asked if there was a particular point in Mississippi where all of his followers would meet he replied that he intended to join the movement, that there are thousands of people, probably hundreds of thousands,

in Mississippi standing beside Governor Barnett, and that the best place to assemble would be at the Capitol at Jackson, or at the University of Mississippi in Oxford (S.F. 803).

The next day, September 29, 1962, with full knowledge that Governor Barnett by then had been held in contempt of the Fifth Circuit Court (S.F. 762), but was continuing his course of opposition to its mandate (S.F. 841), General Walker proceeded by private plane to Jackson, Mississippi, where he held another press and television conference at the Sun & Sands Motel*. There, over television for all to hear who cared to listen, he said:

> **"I am in Mississippi—beside Governor Ross Barnett.**
>
> **"I call for a national protest against the conspiracy from within.**
>
> **"Rally to the cause of Freedom in righteous indignation, violent vocal protest and bitter silence under the Flag of Mississippi at the use of Federal troops.**
>
> **"This today is a disgrace to the Nation in 'Dire Peril'—a disgrace beyond the capacity of anyone except its enemies.**
>
> **"This is the conspiracy of the crucifixion by the anti-Christ conspirators of the Supreme Court in their denial of prayer and their betrayal of a Nation." (Def. Ex. 8, S.F. 789, 790)**

*He was not staying at the motel, but went there to meet the press.

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

At the same press conference he was asked if he had been in contact with Governor Barnett, and he replied that he had been in contact with the Governor's office and hoped to see the Governor while in Jackson (S.F. 790-791).

That afternoon, General Walker began to hear reports that Meredith was being moved into the campus that day, and that military forces were being committed (S.F. 640). He canceled his plans to attend a football game that night in Jackson (S.F. 640), and proceeded by automobile to Oxford, Mississippi, with his fan Louis Leman, where he was registered in a motel under the name John Waters after a midnight drive through the campus (S.F. 648-649).

The next day, Sunday September 30, 1962, he went to the Sheriff's office in Oxford and offered to assist the Sheriff in any way he could (S.W. 839). At that time he knew that the Sheriff was under the jurisdiction of the Governor (S.F. 840); that the Governor had used the police forces of the State, including the Sheriff, to prevent the entrance of Meredith into the University, and that the Governor had not changed his position (S.F. 841).

At lunch that day in downtown Oxford, several reporters asked him for a statement, and he finally agreed to hold a press conference late that afternoon at the Ole Miss Motel where the reporters were staying (S.F. 656). As fortune would have it, he happened to have lying around an old speech that he had prepared by 9 o'clock that morning (S.F. 849), and it suited the occasion perfectly. That afternoon he delivered it to the press conference. Short and to the point, he said:

"As the forces of the New Frontier assemble to the North, let history be witness to the cour-

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

age and determination that calls us to Oxford to support a courageous Governor. His lawful stand for State Sovereignty is supported by thousands of people beyond the State borders now on the way to join you at Oxford." (Def. Ex. 11, S.F. 794).

At the same press conference he learned that U. S. Marshals and Meredith were on the campus (S.F. 658, 865).

Thus, for several days down to and including the day of the riot, General Walker had been quite vocal in the press, and was anxious to get his message out to those who cared to listen (S.F. 833-834).

That evening, September 30, 1962, about 8 o'clock, he and Louis Leman ate dinner in a downtown Oxford cafe, where they listened to President Kennedy's speech (S.F. 850) in which the President announced that Meredith was in residence on the campus of the University, and called upon the people to preserve law and peace. The President also stated that he had federalized the Mississippi National Guard as the most appropriate instrument to preserve law and order, if needed, to back up the United States marshals (S.F. 868, et seq.). Upon the conclusion of the President's speech, General Walker's comment was "Nauseating, Nauseating" (S.F. 874), which expressed his feelings toward the Federal Administration (S.F. 875).

He had finished dinner and was leaving the restaurant with Leman when he heard that there was trouble on the campus (S.F. 663-664). He and Leman then drove to the campus (S.F. 664).

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

The Riot

General Walker and Louis Leman arrived on the campus about 8:45 that evening (S.F. 446), at which time a loud, violent riot was in progress in an area of the campus that is known as the Circle (S.F. 162, 169, 192, 206, 294, 295, 297, 420, 477), sometimes inaccurately referred to in the testimony as the Grove (Actually, the Grove is another area that lies to the northeast of the Circle). To assist the Court in following the evidence, we have attached a plot plan of the area to this Application. It is a reduced partial reproduction of Plaintiff's Exhibit 11.

As may be seen from the plot plan, University Avenue enters the campus from the east and then divides to form encircling drives around the Circle. At the east end of the Circle is a Confederate Monument referred to throughout the testimony as the Monument or the Statue. At the west end of the Circle and across the drive is the Lyceum Building. It is the center or the headquarters of the University (S.F. 1391). Slightly west of the center of the Circle is the flagpole, and it forms the intersection of crosswalks that traverse the Circle in North-South and East-West directions. The distance from the monument to the Lyceum Building is approximately 525 feet. The flagpole is approximately 275 feet west of the monument on a direct line between it and the Lyceum Building. Proceeding clockwise from the Lyceum Building, and to the north of the Circle, are Peabody Hall, the Fine Arts Building, and the Y. M. C. A. Building. Moving counter-clockwise from the Lyceum Building, and to the south of the Circle, are the

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

Chemistry Building, Carrier Hall (the Engineering Building), and Hume Hall (the Science Building), which was under construction at the time of the riot.

By approximately 4 o'clock that afternoon a ring of federal marshals had encircled the Lyceum Building (S.F. 151), where Justice Department officials and for a time the head of the Mississippi Highway Patrol, a Colonel Birdsong, were located (S.F. 1368). A crowd had assembled in the Circle area and began taunting and jeering the marshals. Mississippi Highway Patrolmen stood between the marshals and the crowd in the Circle until the riot started. By approximately 8 o'clock that evening a full scale riot had erupted which was to continue all night, destroy 16 automobiles, kill two people, injure 50, and result in the arrest of 160 persons, including the plaintiff (S.F. 228, 296, 1349, 1350, 714).

By all accounts, including General Walker's, the riot was serious and violent by the time he arrived, and it got worse as the night wore on. The rioters would form into groups and charge toward the marshals, throwing bricks, bottles, rocks, sticks, and other missiles before being repulsed by the tear gas (S.F. 158, 201, 488, 555, 1291). As described by plaintiff's witness Kuettner, it was a full scale riot and a dangerous situation. (S.F. 1278); the movement of the crowd was an ebb and flow kind of surging, accompanied by loud cursing and yelling (S.F. 1290). Newsmen were also a target of the crowd's wrath (S.F. 193). Later in the evening, the rioters attempted to charge the marshals with a fire truck and then with a bulldozer (S.F. 1283-1285), both of which attacks were without

success. At one point, according to General Walker's own testimony, someone queried him as to how to combat the tear gas, and he advised to use sand (S.F. 919), but stated "Where would you get sand?" (S.F. 920). The rioters would hurl "Molotov cocktails" at the marshals (S.F. 1294). These were soft drink bottles filled with gasoline and equipped with burning fuses (S.F. 1294). Walker was in the vicinity of the Molotov cocktails (S.F. 363). The bricks, stones, and other missiles were, for the most part, obtained from construction materials at the site of the new Science Building southeast of the Circle (S.F. 1215). The charges toward the marshals would originate near the monument, close to the supply of ammunition, and would proceed west toward the marshals.

Finally, rifle fire erupted, and by the following morning there were some 7 to 10 bullet holes in the front of the Lyceum Building (S.F. 1352-1353). The next morning the campus looked like a battle field (S.F. 1296, 261, Def. Ex. 20, 21, 23, 24, 25, 28). Concrete benches in the Circle along the sidewalks had been broken and used as missiles (S.F. 295).

General Walker and Leman had left the car several blocks east of the Circle (S.F. 875) and walked down University Avenue in a westerly direction toward the monument (S.F. 876), arriving, as hereinabove stated, about 8:45 P.M. According to General Walker's own testimony, as he approached the Circle from the east, people were moving along the sidewalks and he said to them "Come on", and waved across the street to a group that recognized him (S.F. 878). By the time he reached the monument he began

Appendix C

Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

hearing students saying "We have a leader" (S.F. 882), and asking him "Will you lead us up to the steps; will you get us organized; will you lead us?"; and that was the predominant question on the campus at that time, according to General Walker (S.F. 883). About that same time he met a deputy sheriff named Talmage Witt and requested the sheriff to deputize him, but the sheriff refused (S.F. 885, 886). Witt, who appeared at the trial as a plaintiff's witness, is 5'-11" tall and weighs 275 pounds (S.F. 314), and fits the description of the "portly" man described in the story by defendant's reporter, Savell.

Other evidence which occupies literally hundreds of pages of the Statement of Facts, and which will be discussed under subsequent points of error, conclusively establishes as a matter of law that, applying correct principles of Texas law, both the "command" and "charge" statements were substantially true and were fair comment. Generally, such evidence shows without dispute that upon his arrival at the scene of the riot General Walker was hailed by the rioters as their leader, that he delivered at least one speech to the rioters in which he told them that they had a right to continue protesting, and that he moved toward the federal marshals on one or more occasions surrounded by rioters. However, for the purpose of argument under this point of error, the truth or falsity of the statements is immaterial because the First and Fourteenth Amendment protection under the rule laid down in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A. L. R. 2d 1412, and *Garrison* v. *Louisiana*, 379 U. S. 64, 13 L. Ed. 2d 125, 85 S. Ct. ...., does not depend upon truth or falsity.

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

Argument and Authorities

To be sure, the actual holding of the *Times* and *Garrison* cases applied to public officials, since the persons alleged to have been libeled in those cases *were* public officials. It is manifest, however, from the reasoning underlying the decisions that they cannot be so limited. Moreover, to so restrict the *Times* and *Garrison* rule would create constitutional anomalies of the most serious kind and would, indeed, engender the very dangers that the rule was intended to avoid.

The plaintiff's declared purpose on the night of the riot —September 30, 1962—was to stand shoulder to shoulder with Governor Barnett in opposing the orders of the courts. He was in Oxford to support the Governor's position, and he occupied the same position from the standpoint of the law of libel as Governor Barnett, whose cause he was publicly supporting.

It would be a constitutional anomaly having neither substance nor shadow of basis in reason to hold on the one hand that Governor Barnett is within the *Times* rule, which he clearly is, and yet to hold on the other hand that those who publicly rise to stand beside him, seeking with equal vigor and effect to rally public support for his cause, are not. Logically, the Constitutional protection, if it is to exist at all and have any fairness about it, must extend to the area of public debate and to those who participate in it.

Appendix C

Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

The question before this Court, then, is whether the *Times* and *Garrison* cases laid down a narrow, technical rule, strictly limited to public officials, as held by the trial court and apparently by the Court of Civil Appeals, or whether they announced a broad constitutional policy of real substance which applies to matters of serious public concern and to public men of political prominence who inject themselves into political controversies seeking to sway public opinion and gain public support for their cause, as held by the Federal Court in the *Courier-Journal* case.

A question of equal significance is whether the severe limitations upon the defenses of substantial truth and fair comment, as enunciated and applied by the court below, afford the safeguards for freedom of speech and press required by the *Times* and *Garrison* decisions.

In this argument we will show that the philosophy and reasoning underlying the *Times* and *Garrison* opinions, the holdings and statements by other courts that have considered the question subsequent to those decisions, and the great weight of comment by legal writers, clearly support the holding of the Federal Court in the *Courier-Journal* case; and that the restrictive interpretation of the defenses of substantial truth and fair comment as applied by the court below would, if permitted to stand, effectively inhibit and preclude the various news media from reporting, in good faith, events of profound national significance, thus creating a form of censorship through fear of libel actions that is the direct antithesis of the spirit and holding of the *Times* and *Garrison* cases.

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

The touchstone of the *Times* and *Garrison* decisions was the Supreme Court's recognition of the existence and wisdom of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . .", and the premise that it is the purpose and philosophy of the First Amendment to insure free and uninhibited exchange of ideas on issues of public importance, even though such a freedom, like others, will result in some abuses.

Quoting from Judge Learned Hand, the court in the *Times* case said that the First Amendment " 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.' " The court then quoted the "classic formulation" of the principle:

> " 'Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

> is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.' "

Recognizing that "some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than that of the press," the court then quoted from an earlier opinion as follows:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of democracy."

In short, the holding of *Times* and *Garrison* is that, in the long run, freedom of expression on public matters is of overriding public importance regardless of the excesses and abuses that may occasionally result; and that the indi-

vidual's claim for libel is pre-empted by the paramount public need for information on public issues.

Moreover, the court's heavy emphasis in the *Times* case on the opinion of the Kansas Supreme Court in *Coleman* v. *MacLennan,* 98 P. 281, leaves no doubt that the decision extends to all matters of great public concern. The court quoted with approval the following from the Supreme Court of Kansas:

> "In such a case the occasion gives rise to a privilege, qualified to this extent: any one claiming to be defamed by the communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes *matters of public concern, public men,* and candidates for office." 78 Kan. at 723. (Emphasis added)

In *Pauling* v. *News Syndicate Co.,* 335 F. 2d 659 (2 Cir. 1964), an action for libel, the court said, as an alternative ground for its holding:

> "Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extension; if a newspaper cannot constitionally be held for defamation when it states without malice, but cannot prove, that an incumbent seeking re-election has accepted a bribe, it seems hard to justify holding it liable for further stating that the bribe was offered by his opponent. Once that extension was made,

> the participant in public debate on an issue of grave public concern would be next in line; thus, as applied to the case in hand, if a newspaper could not be held for printing Dr. Pauling's charges that a member of the Atomic Energy Commission had 'made dishonest, untrue and misleading statements to mislead the American people' and that a United States Senator is 'the greatest enemy . . . the United States has,' as the New York Times case decided, one may wonder whether there would be sound basis for forcing it to risk a jury's determination that it was only engaging in fair criticism rather than misstating facts if it printed, falsely but without malice, that in saying all this Dr. Pauling was following the Communist line." (671)

In *Gilberg* v. *Goffi*, 251 NYS 2d 823, an action for libel, the rule of the *Times* case was applied to a mayor's law partner, who was neither an officeholder nor a candidate for office, but who had entered a public controversy as to whether a municipal code of ethics was needed to bar the mayor and his law firm from practicing law in the city court.

In *Pearson* v. *Fairbanks Publishing Co., Inc.* (Superior Court of Alaska, Fourth District, No. 10,209), the action was to recover damages for libel. The alleged libel was the charge that the plaintiff, a newspaper and radio columnist, was the "Garbage Man of the Fourth Estate." The court, in taking note of the *Times* decision and holding that the publication complained of was not actionable, said, in an

Appendix C

Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

opinion not yet published, that "Drew Pearson, a public figure and internationally known newspaper and radio columnist of no mean proportion, should occupy the same standing in the law of libel as Senator Gruening whose cause he was publicly supporting."

In the case at bar, there can be no doubt that the question of school integration that came to a head in the Mississippi crisis was a matter of grave national controversy and concern. It was one of the most dominant and widely debated issues of this century. In the *Times* case, the Supreme Court referred to the integration question as "one of the major public issues of our time . . .", (at 701). This is also conclusively established in the record. The plaintiff was a national public political figure (S.F. 331, 486, 516) and a recent candidate for high public office. He knew that the question of integration was a matter of national controversy and interest (S.F. 759); he knew that his going to Mississippi would create considerable publicity (S.F. 922); he sought that publicity; he knew that there was an explosive situation on the campus and that feelings were high in Mississippi (S.F. 922); and that the Chief Executive of the State was openly obstructing the mandate of the Fifth Circuit Court. His repeated television and radio addresses called attention to himself and solicited support for the cause that he championed. That he deliberately and publicly became part and parcel of the controversy is not open to question.

If the *Times* decision applies at all to matters of public concern and participants in debate on public issues, it clearly applies to plaintiff and his conduct in Mississippi. The

publications complained of in the case at bar were not mere gossip about the plaintiff in some private capacity. The defendant was reporting the crucial events at Oxford, and plaintiff's voluntary presence brought him within the area of national controversy.

If the *Times* rule were to be limited to public officials, a national press columnist or TV commentator could state falsely, but without malice, that a public official was a thief and clearly come within the ambit of the rule, but anyone who dared to enter the debate by publicly suggesting that the columnist or commentator was a liar in so stating, would be denied the same protection. This is scarcely wide-open debate. A defeated presidential candidate could spend the ensuing four years rallying public support by defamatory statements about the incumbent and enjoy the protection of the rule, but those who would criticize the challenger would have to do so without it.

The Court can well imagine other examples, such as labor leaders, political party leaders, campaign managers, national magazines, and countless others who wield broad public power and have wide public support for themselves and those that they champion, but who hold no public office. Surely it would be unthinkable to hold that utterances made *about* them are to enjoy less protection than the clamor that *they* are free to utter about public officials under the *Times rule*. If the people are to be free to criticize the Government and those who comprise it, they must be free to criticize the critics within the same latitude and under the same rule of law. To hold otherwise would create an imbalance of the freedom of expression and could con-

ceivably result in an atmosphere in which an administration could be toppled by a rising Castro who, by virtue of holding no office, enjoyed freedoms of expression about the Government that were denied to those who would criticize him.

The repressing effect of a half million dollar award upon freedom of expression is so patent, the inhibiting effect upon the presentation of conflicting and controversial political argument so plain, and the punishment for such presentation so burdensome and oppressive that this Court may not, consistent with the First Amendment, permit its imposition. As the court said in the *Times* case:

> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."

Cf. *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963); *Marcus* v. *Search Warrant,* 367 U. S. 717 (1961); *Shelton* v. *Tucker,* 364 U. S. 470 (1960); *Speiser* v. *Randall,* 357 U. S. 513 (1958).

In a comment at 19 *Southwestern Law Journal* 399, concerning the *Times* and *Garrison* cases, the author, discussing the scope of the protection afforded by those cases, concluded as follows:

> "Frequently, protection of statements made against controversial public figures is more important than protection of those made against public

officials. Discussion concerning particular minor officials is much less significant than discussion concerning important public figures, such as corporation executives. Thus, protection of statements against all public officials, whatever the echelon, seems unnecessary, while protection of statements against some controversial public figures seems highly desirable. Thus, a rule strictly applicable only to defamation against public officials seems unwise. A more appropriate solution would be to apply the rule when the public interest in the dissemination of truth requires it, whether the individual is a public official or a private citizen. The public interest is the correct test, not the popularity or notoriety of the individual involved. The social utility in protecting statements made against popular entertainers would be very slight. On the other hand, there would seem to be a great utility in protecting statements made against labor leaders, who, though not so well known, are closely connected with governmental affairs." (407)

It would be difficult, if not impossible, to conceive of a matter in which the public would have a greater interest than in reports on the activities of a person, already politically prominent, who has taken to the airwaves and called for tens of thousands of persons to leave their homes and join him at a scene of civil disorder and crisis in a distant State, there to stand beside and assist another political leader who is openly defying the orders of the Federal

Courts. There could be no possible reason or consistency whatever in holding that Governor Barnett is within the *Times* rule, but that one who rises to stand beside him is not. The object in either case is the same, the solicitation of public support is the same, the impact upon public opinion is the same, the potential influence and effect on the outcome of the controversy are the same, and consequently the interest of the public is the same. A distinction based merely upon the fact that the one holds office and the other does not would have no reason and would serve no purpose that can be imagined.

Similar comment by legal writers can be found in 9 *Villanova Law Review* 534, 537; 48 *Marquette Law Review* 128, 133; 10 *New York Law Forum* 249; 42 *Texas Law Review* 1080, 1084; 16 *Syracuse Law Review* 132, 135; 26 *Montana Law Review* 110, 115; 39 *Tulane Law Review* 355, 362; and 49 *Cornell Law Quarterly* 581.*

It is beyond dispute that General Walker publicly summoned his followers to journey to Oxford, with their flags, tents and skillets, to record their opposition to and demonstrate against federal authority; that in the very shadow of the Mississippi State capitol, he announced, at a nationally televised press conference, that he was in Mississippi to stand "beside Governor Ross Barnett" in his defiance of the President and the Federal Courts; that he thereafter arrived at the "Ole Miss" campus at a time when violent rioting was already in progress;

*We suggest that legal commentary written *after* the *Times* and *Garrison* decisions is more profitable reading in considering the question at hand than the article relied on by the Court of Civil Appeals, which pre-dated those decisions by over a third of a century.

that, upon his arrival, General Walker was hailed by the rioters as their "leader"; that he condemned an Episcopal minister for trying to persuade the rioters to disperse; that he gave advice to the rioters on how to combat the tear gas which the federal marshals had used to defend themselves; that he delivered a speech to the rioters in which he told them, by his own admission, that they had a right to protest and that they should continue to protest —this at a time when he had personally observed scores of rioters throwing rocks and bricks at the federal marshals; that he had approached the Lyceum Building—where federal marshals were defending themselves—surrounded by rioters (See pp. 50-77, infra).

If, upon these facts and the hysteria and confusion surrounding the event, a news medium cannot, without risk of a $500,000 libel judgment, report that General Walker "assumed command" of the crowd and "led a charge" on the Lyceum Building, then the Constitutional freedoms contained in the First and Fourteenth Amendments are rendered virtually meaningless; for, if such reporting, in good faith, is not to be protected by the defenses of substantial truth or fair comment, or both, then a news medium's only prudent recourse is to refrain altogether from reporting significant, news-worthy events, even those which arrest the attention of the entire nation.

Plainly, the holding below constitutes a substantial encroachment upon freedom of speech and consequent freedom of debate on the many issues posed by events such as those which occurred at Oxford.

It is no answer to any of the foregoing to assert, as does the plaintiff (and, apparently, the court below), that

a reporter need have no fears if he reports only the "facts". In the pressure of events and the time limitations inherent in the transmission of news, it would manifestly be impractical—even if possible—to report a myriad of "facts", as contrasted with conclusions of fact based on the rapidly unfolding panorama of events and sensations.

Even assuming that a reporter, in the heat and confusion of the moment, could comprehend and apply a distinction difficult of application even for trained lawyers and judges in an atmosphere far removed from the events themselves, imposition of such restrictions and limitations would virtually prohibit the reporting of the event itself. It is like saying that the A.P. can report the detailed events of a battle—so long as it makes no errors—but if it transmits the conclusion of fact that the battle was lost, it does so only at the risk of suits by the Commanding General.

It is of great national interest and significance—for many reasons—that a former General Officer in the United States Army, the Commander of the troops at Little Rock, and one who had but recently campaigned for high public office, had publicly called upon his fellow citizens to register their defiance of Federal authority and had thereafter, at least apparently, participated in and encouraged violent acts of defiance themselves. If the ostensible activities of General Walker in this situation can be "blacked out" or censored through application of the law of libel, coupled with a restrictive interpretation of the defenses of substantial truth and fair comment, then the unconstitutionally inhibiting effects of the libel laws upon news media, and upon freedom of speech and press generally, are self-evi-

dent. It would be impossible, in reporting a riot, to distinguish with precision those persons who were moving toward the objective in a charge from those who were moving toward the objective just to "watch what happened," particularly where, as in this case, both movements appeared identical and charges of that very kind were occurring all night and were the rule, not the exception.

It is significant that, outlining the scope of the "fair comment" defense in Texas, the starting point of the Fort Worth Court's analysis was the proposition that a charge, made in good faith and without malice, that a public official is guilty of a crime is actionable under the libel laws. (Opin. pp. 13-14). Thus, the very keystone of that court's opinion is in direct and irreconcilable conflict with the holding in *Times* and *Garrison*.

Nor is it wholly without significance that the defense of "fair comment" which was raised in the *Times* case appears to have been substantially identical to that enunciated by the Court of Civil Appeals here. See *New York Times Co.* v. *Sullivan, supra.*, p. 267.

Where, as here, the defense of "fair comment" is so truncated as to make it, in the adopted words of the court below, a "weak defense" . . . "subject to so many limitations that it is seldom completely applicable," and where, as here, such limitations are invoked to impose a liability of half a million dollars for reporting in good faith the facts as they appeared to be, it becomes obvious that the libel laws are here being used to achieve a result which the Federal Constitution prohibits.

Under the rule of the *Times* and *Garrison* cases, the constitutional protection can be denied only upon a show-

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

ing of actual malice, i.e., a showing that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not. As correctly held by both courts below, there is no evidence of malice in the case at bar. Indeed, the trial court, by written opinion, expressly recognized that since there was no actual malice the rule of the *Times* case, if applicable, would require that judgment be rendered for the defendant (Supp. Tr.) The trial court's error was in holding that the rule of the *Times* case was limited to public officials. Since the *Times* case cannot be so limited, and since there was no evidence of actual malice, judgment should now be rendered for defendant.

APPENDIX C

Motion of Petitioner The Associated Press for Rehearing in the Supreme Court of Texas, pp. 1-2

No. A-11069

IN THE

SUPREME COURT OF TEXAS

THE ASSOCIATED PRESS,
Petitioner

vs.

EDWIN A. WALKER,
Respondent

PETITIONER'S MOTION FOR REHEARING ON APPLICATION FOR WRIT OF ERROR

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner, The Associated Press, respectfully submits this Motion for rehearing and reconsideration of its Application for Writ of Error heretofore filed herein, and which was refused, no reversible error, by this Court on February 9, 1966, and as grounds therefor respectfully shows as follows:

Appendix C

Motion of Petitioner The Associated Press for Rehearing in the Supreme Court of Texas, pp. 1-2

1.

This Court erred in overruling Petitioner's First Point of Error, which reads as follows:

> "The news reports here involved, made without malice, concerning matters of grave national concern, are protected from the claim of libel by the First and Fourteenth Amendments to the Constitution of the United States, and the judgment herein therefore abridges defendant's rights thereunder; and the Court of Civil Appeals erred in holding to the contrary."

because the publications here in question are privileged and protected under the First and Fourteenth Amendments to the Constitution of the United States as interpreted in the cases of *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A. L. R. 2d 1412, and *Garrison* v *Louisiana,* 379 U. S. 64, 13 L. Ed. 2d 125, 85 S. Ct.

* * *

APPENDIX D

Judgment of the Texas Court of Civil Appeals

THE ASSOCIATED PRESS
16624
vs.
EDWIN A. WALKER

(No. 31,741-C)
July 30, 1965

From the District Court of Tarrant County.

Opinion Per Curiam.

This cause came on to be heard on the transcript of the record and the same having been reviewed, it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court in this cause be and it is hereby affirmed.

It is further ordered that appellee, Edwin A. Walker, do have and recover of and from appellant, The Associated Press, and its surety on its supersedeas bond, Houston Fire and Casualty Insurance Company, the amount adjudged below, with interest thereon at the rate of six per cent per annum from August 3, 1965, together with all costs in this behalf expended, both in this Court and in the trial court, for which let execution issue, and that this decision be certified below for observance.

Appendix D

Judgment of the Texas Court of Civil Appeals

THE ASSOCIATED PRESS
17887-16624
vs.
EDWIN A. WALKER

September 17, 1965

This day came on to be heard the motion by appellant for a rehearing in this cause and said motion having been duly considered by the Court is hereby overruled.

THE ASSOCIATED PRESS
17888-16624
vs.
EDWIN A. WALKER

September 17, 1965

This day came on to be heard the motion by appellees (*sic*) for a rehearing in this cause and said motion having been duly considered by the Court is hereby overruled.

Appendix D

Judgment of the Supreme Court of Texas

IN THE SUPREME COURT OF TEXAS

No. A-11,069
THE ASSOCIATED PRESS
vs.
EDWIN A. WALKER

February 9, 1966

From Tarrant County, Second District.

Application of The Associated Press, as well as the conditional application of Edwin A. Walker, for writs of error to the Court of Civil Appeals for the Second Supreme Judicial District having been duly considered, and the Court having determined that same present no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said applications be, and hereby are, refused.

It is further ordered that applicant, The Associated Press, and its surety, Houston Fire & Casualty Insurance Company, and applicant, Edwin A. Walker, each pay all costs incurred on their respective applications for writs of error.

Appendix D

Judgment of the Supreme Court of Texas

No. A-11,069
THE ASSOCIATED PRESS
vs.
EDWIN A. WALKER

March 23, 1966

From Tarrant County, Second District.

Motion of The Associated Press for rehearing of its application for writ of error having been duly considered, it is ordered that such motion be, and hereby is, overruled.

APPENDIX E

Conflicting Opinions

1. *Walker* v. *Courier-Journal and Louisville Times Co.*, 246 F. Supp. 231 (W. D. Ky., 1965)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE, KENTUCKY

EDWIN A. WALKER *Plaintiff* *vs.* COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY, INC. WHAS, INC. *Defendants*	Civil Action No. 4639

OPINION

This cause comes on before the Court on the Defendants' Motion to Dismiss the Plaintiff's Complaint, as amended.

On September 30, 1963, the Plaintiff, Edwin A. Walker, a former Army Major General, filed this action for actual and punitive damages for libel in the sum of Two Million Dollars, against the Defendants, Courier-Journal and Louisville Times Company and WHAS, Inc., Kentucky corporations, with their principal places of business in Louisville, Kentucky. Jurisdiction of the Court over this action is fixed by USC Title 28, Paragraph 1332.

Appendix E

Walker v. *Courier-Journal and Louisville Times Co.*

The Defendant corporations, on October 1, 1962, October 2, 1962 and October 3, 1962, published in their newspapers and/or broadcast over their radio and television facilities, various news items or stories concerning the rioting on the campus of the University of Mississippi, in the City of Oxford, Mississippi, which said published matter had been received by Defendants from national news gathering agencies to which Defendants were subscribers.

The news items or stories so published and complained of by the Plaintiff stated in substance, that the Plaintiff, Walker, had led a charge of rioters against United States Marshals who were present on the University of Mississippi campus carrying out the orders of the United States Courts requiring integration of enrollment of whites and negroes at said University. Plaintiff, Walker, alleged that such items imputed to him that he was a "trouble maker", that he was "participating" in the occurrences taking place in Oxford, all in the context used of inciting of the students to riot, and that the publication reflected libelously on the honor, character and reputation of the Plaintiff.

This Court has considered the briefs and memoranda submitted by counsel for the parties and taking judicial notice of the public events relating thereto which were widely reported throughout the Nation and are matters of common knowledge, and further treating as true (for the purpose of passing upon this Motion to Dismiss) the factual allegations of the Complaint, as amended, arrives at the following conclusions which are the basis of its final Order entered herein.

Following the filing of this action the Supreme Court of the United States handed down its Opinion in New York Times Company v. Sullivan, 376 U. S. 254 (October Term,

1963) wherein said Court in legal effect federally pre-empted the law of libel in matters of "grave national concern" involving "public officials" with the announced doctrine that

> ". . . . Constitutional guarantees require, we think, a Federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was or not."

There can be no question but that the serious occurrences at the University of Mississippi wherein the State of Mississippi and the Federal Govenment were locked in conflict as to the educational integration of the races was a matter of "grave national concern." The Supreme Court of the United States has classified the integration struggle as "one of the major political issues of our time."

Thus, it can be seen that had the Plaintiff, Walker, been a "public official" at the time of this occurrence, this Court's task would have been automatically relegated to a decision *only* of the *one issue* of whether or not the Defendants herein had published the statements attributed to them with "actual malice", that is, with knowledge that the statements were false or with reckless disregard of whether or not they were false.

However, the matter is not so simple, for this Court notes with significance that in laying down the doctrine of "actual malice" in the Times case, the Supreme Court quoted with approval from the case of Coleman v. McLennan, 78 Kans. 711, 98 P. 281 (1908) as follows:

> "This privilege extends to a great variety of subjects and includes matters of public concern, *public men* and candidates for office." (Emphasis added)

and in conclusion the Court stated:

> "We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable." (Page 283)

In connection with the last above quoted language, the Supreme Court included a footnote to its Opinion (Footnote 23) in part, as follows:

> "We have no occasion here . . . to specify categories of persons who would or would not be included."

From this language I believe the Supreme Court of the United States has served clear notice that the broad Constitutional protections afforded by the First and Fourteenth Amendments will not be limited to "public officials" only, for to have any meaning the protections must be extended to other categories of individuals or persons involved in the area of public debate or who have become involved in matters of public concern. If the Supreme Court intended to limit its holdings to "public officials" only, *then why Footnote 23?* I subscribe that Footnote 23 is of vast importance in understanding the intended scope of the Supreme Court's Opinion, for it is a departure from the Court's traditional rule of basing its decision on the narrowest Constitutional grounds and is interpreted by this

Court as giving special significance to the broad language adopted in arriving at its decision.

The Plaintiff, Walker, is of course not a "public official" within the commonly accepted meaning of the words. However, he was, as he identifies himself in his own Complaint, a person of "political prominence." This Court takes judicial notice that Plaintiff Walker's public life is generally well known to the people of this Nation, that he was the subject of nationwide news reports while on duty as an Army General and also as a candidate for Governor of Texas, and that he has in the past made vigorous public announcements on matters of public concern. Plaintiff was, by his own choosing, present in Oxford, Mississippi, on the occasion of the turmoil after announcing on radio and television his intention to be present there and having called upon others to join with him there in support of his publicly stated position on the matters of public concern there in issue.

Had not Plaintiff thereby become a "public man"? Could he not have reasonably foreseen that his being a person of "political prominence" his presence in Oxford would be taken cognizance of by the press? Had not Walker interwoven his personal status into that of a public one whereby he would become the subject of substantial press, radio and television news comment; thus magnifying the chance that his activities would be "erroneously" reported? This Court so believes.

I therefore reach the inescapable conclusion that the protective "public official" doctrine of "actual malice" announced in Sullivan v. New York Times is in common reason and should be applicable to a "public man" as well, and

that the Plaintiff, Walker, was such a "public man" under the circumstances involved here. "Public men are, as it were, public property."

My application of the doctrine of New York Times v. Sullivan to the facts herein issue finds authority not only in the logical dictates of Footnote 23 discussed above, but in the reasoning and philosophy underlying the Times Opinion and in the critical discussion in legal commentaries and recent decisions of other courts. The decision of Judge Friendly in Pauling v. News Syndicate Company, 335 F. 2d 659 at 671 (2d Cir. 1964), favorably presages the result here. See also Gilberg v. Goff, 251 N. Y. S. 2d 823 (1964); Pearson v. Fairbanks Publishing Co. (Unreported, Superior Ct. of Alaska, 4th District, Nov. 25, 1964); and Pedrick, Freedom of the Press and the Law of Libel, 49 Cornell L. Q. 581, at 592 (1964); 9 Vill. L. Rev. 534 (1964).

I adopt this position with full understanding of the fact that by such extension of the scope of word meaning I am perhaps "plowing new ground" in legal effect, but also with the accompanying conviction that not to do so would negate the spirit of the Times Opinion which I believe to be a ". . . . profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open. . . ." Public debate cannot be "uninhibited, robust and wide open" if the news media are compelled to stand legally in awe of error in reporting the words, and actions of persons of national prominence and influence (not "public officials") who are nevertheless voluntarily injecting themselves into matters of grave public concern attempting thereby through use of their leadership and influence, to mold public thought and opinion to their own way of

thinking. If any person seeks the "spotlight" of the stage of public prominence then he must be prepared to accept the errors of the searching beams of the glow thereof, for only in such rays can the public know what role he plays on the stage of public concern—often, regretfully, a stage torn in the turmoil of riot and civil disorder, whereon error in reported occurrence is more apt to become the rule rather than the exception.

This is particularly so here where open riot and turmoil with accompanyiig destruction of property, injuries and death turned portions of the University of Mississippi campus into a strife beset no man's land through the dark hours of the night.

Therefore, having applied the doctrine of the Times case to this action, this Court moves on to a consideration of this record, upon the sole remaining question: whether or not these defendants have been guilty of "actual malice" in their publications of data furnished them by national news gathering agencies.

Plaintiff, Walker, is bound to show that the defamatory falsehoods relied upon were not just that "erroneous statement. . . . inevitable in free debate" noted by Justice Brennan, New York Times v. Sullivan, supra at 271-272) but that they were made with knowledge that they were false or with a reckless disregard of their falsity. The question of the existence of actual malice from the facts taken as true is a matter of law to be determined by the Court.

An examination of the record reflects that the information published by Defendants was furnished to them by national news gathering agencies to which they subscribed and was furnished in the ordinary course of news dis-

semination and published routinely by defendants in the ordinary course of their business endeavors—the dissemination of news to the general public.

Everyone knows that news of any matter of public concern possesses a limited lifetime for to be news it must be published with promptness and dispatch in order that the public be kept informed as to the actions of "public men" and their activities in connection with "matters of public concern." There is just no such thing as interesting and saleable *old* news.

This Court is of the opinion that the Defendants had the right to rely upon the reputable national news sources which furnished them the news items in issue here, and further that the republication of those items by the Defendants, with the errors therein, within the time limits and under the circumstances (ordinary course of dissemination) was not unreasonable. Defendants, in their newspaper and radio and television publications, could not be deemed in reasonableness by the Plaintiff or the public to be warranting the authenticity of the republication of events transpiring from places *far distant,* nor to be assuming the burden of verifying in advance the items reported to them from an *atmosphere of violence and turmoil* by established news gathering agencies, while at the same time meeting the public need and demand for prompt publication and dissemination of news on matters of "public concern."

We must have an informed society. The reliance upon or republications by defendants of the reports of national news gathering agencies as here occurred is, in this Court's opinion, insufficient to establish a "reckless" disregard of the facts, or knowledge of falsity, now *Constitutionally*

necessary to support an action for libel of the kind stated herein.

Indeed, the Plaintiff's very actions have established the facts negativing that "actual malice" which is required to sustain his action. This Court cannot be deemed not to know that which is known widely and generally to the public at large.

This Plaintiff has filed actions, seeking recovery for libels substantially similar to those alleged here, against the Associated Press in Texas, Colorado, Louisiana and Mississippi; against newspapers in Texas, Louisiana, Georgia, Florida, Missouri, Colorado and Wisconsin; and against Newsweek Magazine in Oklahoma.

Furthermore, the news stories complained of were furnished by national news gathering agencies to, and republished by, the principal newspapers, news magazines and radio and television stations throughout the United States.

In addition to the Court's judicial notice, the geographical scope and number of Plaintiff's suits and the virtual universality of the publication of the stories complained of, is proof positive of the extensive republication by news sources throughout the Country of the releases challenged here.

These facts clearly negative the possible attribution of "actual malice" to any single publisher.

If, possession of contrary information in the New York Times' own files would support "at most a finding of negligence in failing to discover the misstatements, and is Constitutionally insufficient to show the recklessness that is required for a finding of actual malice", I can conceive of no basis for a finding of actual malice in the reliance upon and

republication of news reports supplied here by reputable news gathering agencies. At most, such reliance could only be that "Constitutionally insufficient" negligence referred to by the Court. New York Times v. Sullivan, 376 US 254, at 287-288, 84 S. Ct. 710. Consistent with the later statement of the Supreme Court in Garrison v. State of Louisiana, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed.2d 125 at 133 (1964), I find that under the facts alleged here the statements in issue cannot have been "made with the high degree of awareness of their probable falsity demanded by New York Times."

Accordingly, it is this Court's opinion that the doctrine proclaimed by the New York Times case is dispositive of all the issues here presented and, therefore, Defendants' Motion to Dismiss is sustained and the Plaintiff's Complaint is dismissed with prejudice, by separate Order contemporaneously issued herewith.

September 23, 1965.

JAMES F. GORDON
James F. Gordon, Judge
United States District Court

For the Plaintiff:

Mr. Richard C. Oldham
Mr. Clinton R. Burroughs
312 S. Fifth Street
Louisville, Kentucky-40202

For the Defendants:

Mr. Wilson W. Wyatt
Mr. Edgar A. Zingman
M. E. Taylor Building
Louisville, Kentucky-40202

APPENDIX E

2. *Pauling* v. *National Review, Inc.*
(Not yet reported)

SUPREME COURT
NEW YORK COUNTY
SPECIAL AND TRIAL TERM—PART X
(Feb. Term, Cont'd.)

LINUS C. PAULING,

Plaintiff,

—against—

NATIONAL REVIEW, INC., WILLIAM A. RUSHER, and WILLIAM F. BUCKLEY, JR.,

Defendants.

SILVERMAN, J.:

This is a motion to dismiss the complaint at the close of the plaintiff's case in the trial of an action for libel.

Plaintiff, Dr. Linus C. Pauling, is a world famous scientist, winner of a Nobel Prize for chemistry and of a Nobel Peace Prize. Defendants are the corporate owner, and the individual publisher and editor of a fortnightly magazine called National Review.

There are two causes of action based on two articles, one in the National Review of July 17, 1962 and one in the issue of September 25, 1962.

The first article says, among other things:

> *"The Collaborators*
>
> What are we going to do about those of our fellow citizens who persist in a course of collaboration with the enemy who has sworn to bury us?
>
> * * *

Appendix E
Pauling v. National Review, Inc.

"Take, second, Professor Linus Pauling of the California Institute of Technology, once more acting as megaphone for Soviet policy by touting the World Peace Conference that the Communists have called for this summer in Moscow, just as year after year since time immemorial he has given his name, energy, voice and pen to one after another Soviet-serving enterprise. Or * * * Or * * * who a couple of months ago, along with Linus Pauling and a dozen others, attached their signatures to one more in a decades-long series of Communist-aiding fronts: this time, an Open Letter not only calling for the liquidation of South Vietnam's President Ngo Dinh Diem but condemning the presence of American personnel in that country as imperialist aggression (hence, by implication, more than justifying the Vietcong for killing Americans).

"Are such persons Communists? Some such undoubtedly are, but there is not publicly at hand the full proof, of the kind demanded by the courts, that they are Communists in the total, deliberate, disciplined organizational sense. But whether they are Communists are not in the legal sense, the objective fact is that these persons we have named, and many others like them, have given aid and comfort to the enemies of this country. They have done so not once or twice, by what might have been a special impulse, quirk or personal attachment, but time and again, over a period of years and decades; and some of these acts are saved from falling under the constitutional definition of treason only by the historical chance that our government has not yet

"

decided to give direct legal recognition to the fact that our present enemies are our enemies, and that we are at war.

"So we repeat: what are we going to do about these people? If it is proper that for the time being they should be immune from legal sanction, does it also follow that they should continue to receive public respect, honor and rewards?

* * *

"This soft and complacent public attitude toward the collaborators amounts, at bottom, to a general collusion in the sabotage of the nation's will, and in the moral nihilism that their actions express. If our standards have so far dissolved that there is no longer *anyone* on whom we will turn our backs, then we as a people are ready for suicide."

The second article sued on reads, in part, as follows:

"Are You Being Sued
By Linus Pauling?

We are (or so his lawyer tells us). And so are other well-behaved papers and people throughout the country.

* * *

"Dr. Pauling is chasing after all kinds of people, even the formidable Sam Newhouse, owner of twenty-odd daily newspapers. His victory signal is the check or two he has wrested from publishers—who may indeed have libeled him, in which case they should pay up; but who may simply have been too pusillanimous to fight back against what some will view as brazen attempts at intimidation of the free press by one of the nation's leading fellow-travelers."

Appendix E

Pauling v. National Review, Inc.

Approximately a year and a half after this suit was instituted, the United States Supreme Court in New York Times v. Sullivan, 376 U. S. 254 (1964) enunciated a new doctrine in the law of libel, as affected by the First Amendment. And the critical question on the present motion is whether that doctrine should be extended to apply to the present case, and, if so, whether plaintiff has proved a prima facie case under that doctrine.

In New York Times v. Sullivan, supra, the Supreme Court held that:

> "The constitutional guarantees [of the First and Fourteenth Amendments] require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U. S. at p. 279.)

Plaintiff is not a public official, and so the first question is whether New York Times v. Sullivan has any applicability to his case at all. The Supreme Court has certainly not excluded that possibility. In the New York Times case it said (376 U. S. at 283, Fn. 23):

> "We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, *or otherwise to specify categories of persons who would or would not be included*" (Italics added).

Appendix E
Pauling v. *National Review, Inc.*

In its last pronouncement on the point, the Supreme Court said:

> "We are treating here only the element of public position, since that is all that has been argued and briefed. We intimate no view whatever whether there are other bases for applying the *New York Times* standards—for example, that in a particular case the interests in reputation are relatively insubstantial, because the subject of discussion has thrust himself into the vortex of the discussion of a question of pressing public concern. *Cf. Salinger* v. *Cowles,* 195 Iowa 873, 889, 191 N. W. 167, 173-174 (1922); *Peck* v. *Coos Bay Times Publishing Co.,* 122 Ore. 408, 420-421, 259 P. 307, 311-312 (1927); *Coleman* v. *MacLennan,* 78 Kan. 711, 723-724, 98 P. 281, 285-286 (1908); *Pauling* v. *News Syndicate Co.,* 335 F. 2d 659, 671 (C. A. 2d Cir. 1965)." Rosenblatt v. Baer, decided February 21, 1966, Fn. 12 to Opinion of Brennan, J., 86 S. Ct. 669, 676.

The underlying policy adopted by the Supreme Court in the New York Times case would seem to favor extending the doctrine of that case at least to a private person who "has thrust himself into the vortex of the discussion of a question of pressing public concern".

In Rosenblatt v. Baer (supra), Mr. Justice Brennan, speaking for the court, said:

> "The motivating force for the decision in *New York Times* was twofold. We expressed 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-

> open *and* that [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' 376 U. S., at 270. (Emphasis supplied.) There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. * * * (86 S.Ct. at 675)
>
> * * *
>
> "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments. The thrust of *New York Times* is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation. * * *" (86 S.Ct. at 676)

In determining the relative importance and protection to be given to the interest in public discussion, on the one hand, and the safeguarding of individual reputation on the other, the Supreme Court, in the New York Times case, has shifted the balance sharply in favor of the freedom of public discussion. Logically, of course, limitations on the law of libel as a protection of public persons may discourage private persons (viewed as possible libel plaintiffs) from speaking out on issues when to do so may expose them to attacks on their own reputation. But, conversely, viewing these speakers as possible defendants in libel suits, such limitations may encourage them to speak out. And

the Supreme Court apparently believes that the latter consideration outweighs the former. In New York Times v. Sullivan, 376 U. S. at 271, the Court quoted with approval the following from Cantwell v. Connecticut, 310 U. S. 296, 310:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

In Gilberg v. Goffi, 21 A D 2d 517, 527 (1964), affirmed 15 N Y 2d 1023 (1965), the Appellate Division, Second Department, applying New York Times v. Sullivan, said:

> "Within the periphery of the new body of case law, we hold, on a balancing of interests, that democratic government is best served when citizens, and especially public officials and those who aspire to public office, may freely speak out on questions of public concern, even if thereby some individual be wrongly calumniated * * * ."

The Supreme Court, in the New York Times case, quoted Beauharnais v. Illinois, 343 U. S. 250, 263, that

Appendix E
Pauling v. *National Review, Inc.*

"public men, are, as it were, public property" (376 U. S. 268).

Again, referring to the risk of successive libel judgments against a newspaper, the Court said, at 376 U. S. 278:

> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.".

These considerations, stated by the Court with reference to public officials, would seem to be equally applicable to a private person who publicly, prominently, actively, and as a leader, thrusts himself (however properly) into a public discussion of public and exceedingly controversial questions.

In Gilberg v. Goffi, 21 A D 2d 517 (1964), affirmed 15 N Y 2d 1023 (1965), the New York State courts applied the New York Times doctrine to a law partner of the mayor of a city, who sued a rival candidate for mayor, for libel, when the latter said that the mayor's law firm (of which plaintiff was, of course, a partner) was practicing law under conditions which showed a conflict of interest. The Court said that, although plaintiff was not a public official, "plaintiff's action is so closely related to criticism of a public official that the *Times* case is determinative" (21 A D 2d at 520). Cases in other jurisdictions have applied the New York Times doctrine to private persons who actively engage in a public controversy. (See, e.g., Walker v. Courier-Journal, 246 F. Supp. 231 [W. D. Ky. 1965].)

Finally, the United States Court of Appeals for the Second Circuit has indicated very strongly its view that Dr. Pauling is a person to whom the rule of New York Times

v. Sullivan should apply. In Pauling v. News Syndicate Company, 335 F. 2d 659, 671 (C. A. 2, 1964), the Court said, with reference to the doctrine of the New York Times case:

> "Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extension; * * * . Once that extension was made, the participant in public debate on an issue of grave public concern would be next in line; thus, as applied to the case in hand, if a newspaper could not be held for printing Dr. Pauling's charges that a member of the Atomic Energy Commission had 'made dishonest, untrue and misleading statements to mislead the American people' and that a United States Senator is 'the greatest enemy * * * the United States has,' as the New York Times case decided, one may wonder whether there would be sound basis for forcing it to risk a jury's determination that it was only engaging in fair criticism rather than misstating facts if it printed, falsely but without malice, that in saying all this Dr. Pauling was following the Communist line."

In the case at bar, Dr. Pauling testified that after he read the Smythe Report on atomic energy, about 1946, he became greatly concerned about the destructive effects on our civilization of a possible nuclear war. He began to accept invitations as a speaker on this subject; he became interested in educating his fellow Americans as to this danger; he further testified that this has been a dominating interest with him for over twenty years and, during that

period, he has given some 750 addresses, lectures, talks, etc., with respect to atomic weapons, the need to control them, the need to prevent war, and the need for settling disputes by international law. He has traveled about the world and spoken on these subjects. He has pressed his views on heads of state, ambassadors, and other public officials. His efforts have gained him such prominence in this field that he was awarded the Nobel Peace Prize. By the same token, however, he has from time to time found himself—as was his right as a citizen—in public and active opposition to persons and policies that he deemed inconsistent with his views; and quite frequently his publicly-expressed views on many questions—not merely those relating to his efforts for world peace—have been contrary to those expressed by the more conservative or right-wing elements in this country. On June 8, 1962, he had joined in a call for a World Peace Conference to be held in Moscow that summer. A few months earlier he had joined in "An Open Letter to President John F. Kennedy against U. S. military intervention in South Vietnam", which letter was published as a paid advertisement in the New York Times.

The matters he has discussed are, of course, matters of the gravest and most widespread public importance; they concern the foreign policy of the United States, the military operations now going on, and the future of civilization itself. And at each step there have been many who disagree with Dr. Pauling.

It is clear that if any private citizen has, by his conduct, made himself a public figure engaged voluntarily in public discussion of matters of grave public concern and controversy, Dr. Pauling has done so.

Finally, the criticisms made of him in the alleged libelous articles are not criticisms of his private life; they are criti-

cisms of his public conduct and of the motives for that public conduct. This applies even to the intimation in the second article that by his libel suits he is attempting to intimidate the press; for the freedom of public discussion is itself a public issue and one that is properly a subject of public discussion.

Accordingly, I hold that, in order for Dr. Pauling to recover, it would be necessary for him to meet the standards of New York Times v. Sullivan.

The basic principle of New York Times v. Sullivan is that, in the cases to which it applies, there can be no recovery for even a defamatory falsehood unless the plaintiff proves that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not". (376 U. S. at 280.)

This kind of "actual malice" " 'is not presumed but is a matter for proof by the plaintiff' " (376 U. S. at 284; and see 376 U. S. at 279, quoted supra).

In the case at bar, there is no real evidence that defendants knew that the statements they made were false. A four-year-old conversation with an editor, who did not himself have anything to do with the writing of the allegedly libelous articles, is no more sufficient to show knowledge of falsity than were the new stories in the Times files in New York Times v. Sullivan. As the Court there said, "the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication" of the alleged libel (New York Times v. Sullivan, 376 U. S. at 287).

Plaintiff argues that he has shown "reckless disregard" by the defendants of whether the article "was false or not".

But all the plaintiff's evidence on this phase of the case amounts to, giving it the most favorable inferences, is that defendants relied on unreliable sources, and that if they had checked in a reasonable manner, they would have ascertained that their statements were false. Assuming these facts to be true, that is still not a showing of "reckless disregard of whether it was false or not", in the New York Times v. Sullivan sense. As the Supreme Court pointed out in Garrison v. Louisiana, 379 U. S. 64, 79 (1964):

> "The reasonable-belief standard * * * is not the same as the reckless-disregard-of-truth standard. * * * The test which we laid down in *New York Times* is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth."

Reckless disregard of whether a statement is false or not, in the New York Times sense, is to be contrasted with the "utterances honestly believed" (Garrison v. Louisiana, 379 U. S. at 73) which are to be protected. Such reckless disregard must be the equivalent of the "calculated falsehood" (ibid. at 75), which is not protected.

The evidence presented by plaintiff does not meet this standard.

In this aspect of the case, perhaps the most vulnerable passage in the libelous articles is this:

> "Are such persons Communists? Some such undoubtedly are, but there is not publicly at hand the full proof, of the kind demanded by the courts, that they are Communists in the total, deliberate, disciplined organizational sense."

Assuming that this could be read as referring to plaintiff, it could be argued that this is a charge that plaintiff is a Communist, with an admission that the writer has no evidence of it; and therefore that the charge is made with reckless disregard of whether it is false or not.

But of course the admission in the article that there is no legal evidence to support the charge—assuming it to apply to plaintiff—itself limits the charge. To hold that this statement is not protected under New York Times v. Sullivan would risk the very danger that the Supreme Court gave us a ground for rejecting a rule that defendants be required to prove truth:

> "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone'. * * * The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." N. Y. Times v. Sullivan, 376 U. S. at 279.

Neither knowledge of falsity nor reckless disregard of whether the statements were false or not has been shown with the "convincing clarity which the constitutional standard demands", and thus a judgment based on such evidence would not be permitted to stand (New York Times v. Sullivan, 376 U. S. at 285-286). And it is for the Judge in the first instance to decide whether that standard has been met (Ibid., and compare Rosenblatt v. Baer, 86 S. Ct. at 677, Feb 21, 1966, slip opinion, page 12).

Appendix E

Pauling v. *National Review, Inc.*

The record of this trial is extremely voluminous. So I should make clear that on the basis of pre-N. Y. Times v. Sullivan law, plaintiff would have proved a prima facie case. The articles on their face are libelous, i.e., defamatory if untrue; the defenses of truth, fair comment without malice, etc., to the extent thus far gone into, all present questions of fact for the jury. Publication of the article by the corporate defendant, with the active participation and approval of the individual defendant editor, are (*sic*) conceded. While the participation by the individual defendant-publisher, Mr. Rusher, is perhaps marginal, enough has been shown of his participation to present a question for the jury as to his responsibility. The suggestion that damage has been conclusively disproved by plaintiff's own reputation witnesses is unfounded; to begin with, that issue was not fully explored with those witnesses and properly so under Linehan v. Nelson, 197 N. Y. 482 (1910); and in any event the testimony of the reputation witnesses was limited to plaintiff's reputation in the academic and scientific communities and was not conclusive.

But, applying New York Times v. Sullivan, I hold that plaintiff has failed to prove a prima facie case, and the complaint must be dismissed.

Lest there be any misunderstanding, I do not hold that the charges against Dr. Pauling, made in the articles, are true or justified. It is clear that in all his actions Dr. Pauling acted well within his legal rights. And if his conscience required him to take the actions and pursue the course of conduct that he has pursued for the last twenty years, then he has acted in accordance with his moral duty. Accepting plaintiff's testimony, presumably his work for

public education and world peace has imposed certain sacrifices on Dr. Pauling. Dr. Pauling has added the prestige of his reputation to aid the causes in which he believes. I merely hold that by so doing he also limited his legal remedies for any claimed libel of his reputation. And perhaps this can be deemed another sacrifice that he is making for the things he believes in.

I should finally mention one matter of judicial economy. When plaintiff rested late Friday afternoon, and defendants moved to dismiss the complaint, I reserved decision and indicated that I was going to send the case to the jury ultimately. We were then in the sixth week of trial. (Actually, because of intervening religious holidays, etc., there had been about five weeks of testimony.) If I were to grant the motion to dismiss now, and an appellate court disagreed with me, the appellate court would have no choice but to order a new trial, and the weeks of trial that we have thus far had would have to be done over again. On the other hand, if I reserved decision on the motion to dismiss and let the case go to a jury verdict, then, even if I should thereafter dismiss the complaint, and the appellate court were to disagree with me, the appellate court would not have to order a new trial, but could merely enter the appropriate final judgment. Recognizing that the law in this area is still evolving and that the appellate courts might hold the New York Times case inapplicable, I thought it wiser to reserve decision and thus minimize the risk of retrial. But over the weekend I reconsidered this question, and, accordingly, I inquired of counsel as to how much longer the case would take, and I required them, as officers of the court, to make representations to me as to what additional evidence they expected to produce and by

what witnesses. Counsel's estimate as to the future length of the trial varied, but both sides agreed that there are still a number of weeks to go. My own guess is that probably the remainder of the case would take about as long to try as plaintiff's case has taken thus far. Thus, if I were now not to grant the motion to dismiss, but were to reserve decision, and the appellate courts should agree with me that the doctrine of *New York Times* v. *Sullivan* applies, I would have subjected the parties, the court, and the jurors to about as much additional unnecessary trial as I would if I were to grant the motion to dismiss, now, and the appellate courts disagreed with me. This seems to me too high a premium to pay as insurance against the ever-present risk of error on my part. It is for these reasons that I am not reserving decision.

The motion to dismiss the complaint is granted.

Dated, April 19, 1966.

S. J. SILVERMAN
J. S. C.

APPENDIX E

3. *Gilberg* v. *Goffi*, 21 App. Div. 2d 517, 251 N. Y. S. 2d 823 (2d Dept. 1964) *aff'd* 15 N. Y. 2d 1023, 207 N. E. 2d 620 (1965)

DAVID C. GILBERG, Respondent, *v.*

FERRER F. GOFFI, Appellant.

Second Department, July 9, 1964.

APPEAL from an order of the Supreme Court at Special Term (JOHN J. DILLON, J.), entered January 29, 1964 in Westchester County, which (1) denied plaintiff's motion for summary judgment and defendant's cross application for summary judgment, (2) struck the third defense and portions of the second defense, and otherwise denied the motion to strike defenses, and (3) limited the disclosure and discovery required of plantiff by defendant, and directed that such disclosure and discovery proceed. The appeal, as limited by defendant's brief, is from so much of said order as struck the third defense, and as denied defendant's cross application for summary judgment of dismissal of the complaint.

Harry Krauss for appellant.

David C. Gilberg, respondent in person.

SAMUEL RABIN, J. This appeal turns upon the extent of immunity to be accorded to the campaign utterances, oral and written, of a candidate for public office.

The learned Special Term held that the complaint stated a case for recovery in defamation, and that questions of fact were raised incident to the defenses of privilege and justification. In our opinion, the evidentiary showing made by each party establishes facts which are sufficient, under two landmark decisions rendered after the Special Term's decision, to warrant the granting of summary judgment in defendant's favor.

Appendix E
Gilberg v. Goffi

By reason of these recent pronouncements, the issues at bar may no longer be evaluated solely by the prior controlling precedents in the law of defamation. Now, all utterances addressed to public officials, when challenged in a civil libel action, must be accorded the constitutional safeguards for freedom of speech inherent in the First and Fourteenth Amendments of the Federal Constitution (*New York Time Co.* v. *Sullivan*, 376 U. S. 254, 264-265). The privilege of a citizen to criticize official conduct is part of the evolving body of the law of libel which now recognizes that public officials, in the performance of their duties, enjoy a concomitant immunity when they speak out on matters of public concern, even if a particular citizen be defamed in the process (*Sheridan* v. *Crisona*, 14 N Y 2d 108). The threat of a damage suit should not be permitted to inhibit or curtail the freedom of expression of either the citizen or the public servant (*New York Times Co.* v. *Sullivan, supra*, pp. 282-283).

In the *New York Times* case, the following principles were authoritively declared:

(1) The ancient doctrine that the Constitution does not protect libelous publications may no longer be utilized where its application would serve to impose sanctions upon criticism of the official conduct of public officers (pp. 268-269);

(2) Expressions of grievance and protest on a public issue do not lose their constitutional protection by reason of a combination of falsity of factual statement and of defamatory content (p. 273);

(3) Public officials, like Judges, are expected to be "'men of fortitude'" when assailed by half-truth, misinformation, charges of gross incompetence, disregard of

public interest, communist sympathies, hints of bribery, embezzlement and the like, especially when such charges are hurled in the heat of a political campaign (pp. 272-273);

(4) In cases involving criticism of public officials, a new principle of qualified privilege in the law of libel is to be applied, namely (pp. 279-280): "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

(5) This new principle is to be tested by the facts of each particular case in order to ascertain whether the alleged libelous statements were prompted by actual malice (pp. 284-286);

(6) On weighing the evidence, the court is to avoid such result as might suggest " 'that prosecutions for libel on government have any place in the American system of jurisprudence' "(p. 291); and

(7) The court is likewise to avoid the thwarting of the free expression of impersonal attack on government by investing the remarks with a personal significance (p. 292).

In the *New York Times* case the plaintiff was a Police Commissioner who sought damages in libel by attributing to himself certain false statements which had been published in an advertisement in the *Times* newspaper with respect to the Montgomery (Alabama) local police force which he headed. Plaintiff's money judgment was reversed for lack of demonstration of direct reference to him in the publication and for lack of proof of defendants' actual malice.

Appendix E
Gilberg v. *Goffi*

In our opinion, the same deficiencies rendered insufficient the present plaintiff's cause of action. While the plaintiff claims that he was not a public official, it is our opinion, based upon the proof adduced on the defendant's cross motion for summary judgment, that plaintiff's action is so closely related to criticism of a public official that the *Times* case is determinative and that the plaintiff has no justiciable claim.

The pertinent facts here may be briefly stated:

The Mayor of the City of Mount Vernon was a reputable lawyer who assumed and functioned in his office of Mayor during the period 1960 to 1963. Since June 1, 1960, plaintiff, likewise a lawyer of good reputation and standing, has been a partner in the Mayor's law firm.

Before the Mayor assumed his office, and during his tenure, the *Daily Argus*, a newspaper published in the City of Mount Vernon, reported in various news articles that the question of the adoption and enforcement of municipal conflicts- of-interest rule had been locally advanced. In March and April, 1958, the *Argus* reported that Alderman Kendall had advocated passage of a local law dealing with conflicts of interest. In September, 1962, additional articles with reference to such a local law appeared in the *Argus*. In November, 1962, the *Argus* published a news article to the effect that one Bornstein, who had been feuding with the Mayor on municipal and political matters, had filed a "complaint" with this court in which he challenged the right of plaintiff Gilberg to represent clients in the local City Court while his law partner was Mayor of the City. In the same month, the *Argus* further reported that one Zimmerman had sent a letter to the local Common Council urging that a local law be adopted so as to bar a Mayor or his law firm

from practicing law in the City Court or before municipal agencies and that the Common Council had referred the letter to the local bar association.

In the Fall of 1963, the defendant, a faithful reader of the *Argus,* became an independent candidate for the office of alderman, election to which position would make him a member of the local Common Council. His rival candidates were two incumbent Republican Aldermen (one of whom was Alderman Kendall) and two Democratic candidates. In the ensuing election campaign the defendant was associated with Bornstein and other opponents of the Mayor who was seeking re-election to that office.

On the night of October 22, 1963, defendant together with Bornstein appeared on the public platform, and both made speeches before an audience. The defendant read his speech from a prepared typewritten manuscript, copies of which had been signed by him and distributed earlier to the press for publication. In his address, in the part now relevant, the defendant made the following remarks:

"One of my opponents claimed credit for being the sponsor of a Conflicts of Interests code. We read in the papers of the charges that the mayor's law firm was practicing in the City Court of Mount Vernon, under conditions which show a clear conflict of interests. Yet, neither of them called for any investigation. Is it that they did not care or that they did not dare?

"They have failed to show any courage as aldermen. There has not been a dissenting vote among them in so long a time that it is difficult to remember when any such thing happened. No group can think so much alike for so long a time on so many subjects.

"It would seem as though someone else is doing the thinking for them and that they are merely the 'Yes' men

for this individual. By being 'Yes' men, they have allowed our city to become disgraced among all of the cities of our nation.

"Of my Democratic opponents, both are lackeys of the Democratic mayoralty candidate * * *

"Our mayoralty candidate * * * is a man of recognized decency and integrity. He is our one hope to bring back our city to the sphere of respectability. To do this, he needs aldermen who are prepared to act for him when action is necessary. As members of his team, my running mate and I will see to it that he gets the legislation he needs to carry out his purpose."

The defendant's address was reported in the *Daily Argus* in its issue of October 23, 1963. Orally on the following day, and by copy of a letter sent to such newspaper on October 25, 1963, the plaintiff informed defendant that his (defendant's) statements about the Mayor's law firm were false and defamatory; and plaintiff called upon defendant either to justify publicly his remarks or to avow his error. Plaintiff's written communication stated that he was not a "politician"; that he sought no public office; that no law, rule or regulation prohibited his law firm from practicing in the City Court; and that his firm had appeared in no case "where a conflict of interests may or might arise."

Defendant proffered no formal retraction. In lieu thereof, on October 28, 1963 he sent a letter to the *Argus*, the substance of which it printed in a news article. In such letter defendant referred to the publication in the *Argus* on November 19, 1962 of an article reciting the filing of the Bornstein "complaint" to this court, and then went on to state:

"This fully supports my statement. I have no interest in Mr. Gilberg's method of practicing law, except insofar as it concerns the conduct of the Common Council. I have said and still argue that it was the duty of the Common Council, who on previous occasions, had voiced itself as in favor of a strong conflict of interests law, to have instituted an investigation of the matter. * * * If Mr. Bornstein's charges are sustained in an investigation by the Common Council, it would fall upon that body to adopt appropriate rules for correcting the situation.

"As a candidate for the office of Alderman, it is my privilege and duty to present the issues to the people, and in that sense, I have brought this forth as such an issue."

The instant action was thereafter commenced on the theory that the oral address of October 22 which had been reduced to writing, and the writing of October 28, constituted both a slander and a libel of the plaintiff. In his complaint, plaintiff charges in substance that defendant uttered false statements to the effect that the law firm, of which plaintiff is a partner, had practiced law in the local City Court under conditions which showed a conflict of interests; and that, by innuendo, the defendant had suggested that the law firm had thereby violated some precept which precluded its practice in that court. The complaint neither pleads special damages, nor avers that the defendant's impugning remarks were uttered with malice.

In his answer, the defendant pleaded a general denial, and, *inter alia*, defenses of lack of malice, qualified privilege, and justification. He also set out the various mentioned publications of the *Daily Argus* relating to a municipal conflicts-of-interest law and the presentations made thereon to this court and to the Common Council; and pleaded that his

campaign remarks were not aimed at plaintiff but at his incumbent aldermanic adversaries for the purpose of drawing to the attention of the voters their failure to proceed "with relation to the charge publicly made by the said Bornstein."

In support of his second defense of justification, defendant pleaded that the Mayor's official status as a Magistrate empowered him to act in the City Court and to appoint an acting City Court Judge. Defendant also referred to the Mayor's power of appointment of the Corporation Counsel and various other municipal functionaries, including the local Police Commissioner, and pleaded that these latter appointees appeared in the City Court in the prosecution or defense of divers actions involving the municipality and local law enforcement.

Upon the motions of the respective parties* for summary judgment, the Special Term held that the evidentiary showing as to the defenses of qualified privilege and justification (as corrected) entitled defendant to a trial. The Special Term further held that the issue was not whether defendant had read something in a newspaper, but whether his charge of conflict of interests was objectively true.

On the present appeal, only the defendant seeks review of the denial of summary judgment in his favor. If defendant is correct in his contention that he was entitled to summary judgment on the evidentiary showings, his appeal from so much of the order under review as struck out the defense of truth is moot.

Under the current practice, a motion for summary judgment should be granted where, on the papers and proof

*Defendant did not by cross notice formally move for summary judgment in his favor. He requested such judgment, however, in his affidavit in opposition to plaintiff's motion for summary judgment.

submitted, a cause of action or defense "shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party;" and the motion should be denied where any party shows the existence of any issue of fact, other than an issue as to the amount or extent of damages, sufficient to require a trial (CPLR 3212, subds. [b], [c]). In effect, defendant's cross motion for summary judgment was a motion to dismiss the complaint for failing, on an evidentiary showing, to *state* a cause of action (CPLR 3211, subd. [a], par. 7). The plaintiff's motion for summary judgment, in effect, was an application to dismiss the pleaded defenses for want of substance (CPLR 3211, subd. [b]).

Applying the principles of the *New York Times* case (376 U. S. 254, *supra*) to the facts and pleadings at bar, it is patent first and foremost that the alleged defamatory words of defendant's October 22, 1963 address, set out in paragraph 12 of the complaint, contain no direct reference to plaintiff Gilberg either by name or association with the Mayor's law firm. Construed in the context of indulging in "a clear conflict of interests," defendant's said speech and his press release thereon were limited to practice in the City Court by "The Mayor's law firm." The only proof in this record that such words were susceptible of reference to the plaintiff personally lies in plaintiff's subjective interpretation of the words and in the alleged coincidence that, on October 23, 1963, plaintiff received a number of unidentified telephone messages calling attention to the newspaper article published that day "and the implication of the statement, as the same affected the ethics and legality of law practice in the City Court on my part, [and] my being a member of the 'Mayor's law firm'." Plaintiff's proof on this issue is

therefore precisely the same as the complaint's evidence in the *New York Times* case (*supra*). As there stated, the alleged defamatory words "did not on their face make even an oblique reference" to the complainant "as an individual"; and any proof "that he had in fact been so involved" rested "solely on the unsupported assumption that, because of his official position, he must have been" (*New York Times Co.* v. *Sullivan, supra,* p. 289).

In the *Times* case, the position of the complainant was even stronger, since presumably everybody in the City of Montgomery knew or should have known that he was the Commissioner in charge of the police department; and yet the innuendo that the alleged defamatory matter assailing the police applied to him individually was rejected as unavailing on the "assumption" that he was personally involved in any generic criticism of police action. At bar, although plaintiff stated that his position as the active partner of the Mayor's law firm in charge of City Court cases, was known to Bench and Bar and to most litigants, proof is lacking that defendant knew of this situation or that he even knew the plaintiff. In fact, the proof is that plaintiff and the defendant had never met, and that defendant was attacking the Common Council and his incumbent rivals for membership in that body.

Plaintiff's proof utterly fails to connect the defendant with knowledge, actual or constructive, that plaintiff was a member of the "Mayor's law firm." In the absence of proof of such knowledge and in the absence of specific reference in the alleged defamatory statements to the actual name of such law firm or to the particular individuals who comprised it, it is our opinion that plaintiff has failed at the outset to establish that he was personally included in the

law firm claimed to have been defamed by defendant. Paraphrasing the language of Mr. Justice BRENNAN in the *New York Times* case (*supra*), the proof adduced as to defendant's utterances of October 22 may be taken as referring to "the Mayor's law firm," but they did not on their face "make even an oblique reference" to plaintiff as an individual; and support for such conclusion rests only on plaintiff's "assumption" and those of his unidentified telephone informants—assumptions that cannot properly be drawn directly from the specific words used in the defendant's text.

Nor is plaintiff's case for personal calumny in any way aided by defendant's writing issued on October 28, 1963 to the *Daily Argus* in lieu of a personal retraction to plaintiff and in justification of his October 22 speech and press release. This later writing mentions plaintiff specifically by name for the first time; but, in our opinion, it does not, by reason of such identification, serve to strengthen the plaintiff's case, as urged by plaintiff. That later writing of October 28 made no charge of any unprofessional activity against the plaintiff personally. It merely emphasized defendant's reliance: (a) upon the *Daily Argus'* publication concerning Bornstein's complaint to this court which "had challenged the right of Mr. Gilberg to represent clients in City Court while his law partner is Mayor of the City;" and (b) upon the fact that such complaint constituted a proper reason why the Common Council should have inquired into the necessity for a code of ethics.

Accordingly, on the proof adduced, we are of the opinion that plaintiff has failed to establish that he had been personally vilified for a lack of professional propriety by any utterance, oral or written, ascribable to the defendant. Plaintiff has established only that the "Mayor's law firm"

had been impugned by defendant on a pre-existing claim of conflict of interests which had already appeared in the public press.

In view of the fact that defendant was a candidate for public office; that he was talking about another office-holder's law firm; and that he was calling upon the Common Council to investigate Bornstein's and Zimmerman's pre-existing charges, as already published, with respect to such law firm, it is our opinion that defendant's utterances can fairly be construed only as part and parcel of a debate on the public issue as to whether Mount Vernon required a code of ethics to govern the practice of law in the City Court by a firm, or a member thereof, in which a partner occupied the office of Mayor. The statement by the defendant that Bornstein's and Zimmerman's presentations of that issue had been published in the papers and that he (the defendant) had read the published article was not false, but in fact true.

Nor is it of any avail to plaintiff to claim that he was not a candidate for any public office and that he was outside the political arena. Obviously the law firm, of which he was a member, had generated the public issue on which the the defendant made comment. In our opinion, having entered the fray as champion of that law firm, plaintiff made himself as much a part of the local political campaign as did his law partner, the Mayor. It would be anomalous to hold that the Mayor, as a public office holder, was precluded by the *New York Times* case from suing in libel on a conflict of interest issue affecting his law firm, but that his law partner was individually free to do so on the same subject matter.

Upon the basis of all the proof adduced, it is our opinion that the doctrine proclaimed in the *New York Times* case is

dispositive of all the legal issues, actual or potential, here presented. Accordingly, invoking such doctrine, we may summarily dispose of those issues.

On the issue of malice, the plaintiff was bound to show that the defamatory falsehood relied upon, growing out of the Mayor's conduct as a public official, was made with "actual malice." Plaintiff was required to show that the defendant's utterances were made with knowledge that they were false or with a reckless disregard as to their falsity. Examining the proof tendered on this issue, it is our view that plaintiff produced no evidence that defendant was aware of any erroneous statements or that he was in any way reckless in that regard. At best, it might be said that defendant was negligent in failing to ascertain the truth or accuracy of the details supporting the prior claims of Bornstein and Zimmerman to the effect that the Mayor's law firm had indulged in the practice of law in circumstances involving a conflict of interests. However, as noted in the *Times* case, a finding of negligence in failing to discover misstatements is "constitutionally insufficient to show the recklessness that is required for a finding of actual malice" (376 U. S. 254, 288).

On the issue of privilege, as previously indicated it is plaintiff's contention that defendant could derive no immunity for his utterances, since plaintiff was neither a public officer nor a political candidate. But that contention, as already noted, is untenable. It is our opinion: (a) that in submitting "the Mayor's law firm" as an actionable issue, plaintiff has inextricably interwoven his personal and individual status with that of the firm; (b) that the firm was a proper subject for comment in the public domain; and (c) that in the context of the utterances made, plaintiff and the firm necessarily constituted one and the same juridical person.

Appendix E
Gilberg v. *Goffi*

Accordingly, and solely because the plaintiff's papers fail to make out an actionable wrong, it is our conclusion that the defendant's cross motion for summary judgment should be granted. We see no need, therefore, to discuss defendant's alternative point that his third defense of truth was erroneously dismissed.

In reaching this conclusion, we express no opinion on the underlying controversy which plaintiff has sought to bring to the surface, i.e., the charge that the Mayor's law firm had offended any professional standards of conduct. In our opinion, the propriety of the firm's conduct, or of plaintiff's individual conduct, is not a question for judicial determination in the instant action. The only justiciable questions properly here are: (a) whether such conduct had become a public question; and (b) whether, within the limitations laid down in the *Times* case, the defendant as a candidate had the right to comment thereon as he did. It appears to us that the defendant had such right, and that plaintiff and his law firm must find solace in the philosophy that men in public life must be "men of fortitude" who must endure exposure to the vicissitudes of argument in the public forum, where half-truths, misinformation, and worse, are not uncommon in the furor and in the tempo of a political campaign. In sum, it is our view that discussion of a need for a municipal code of ethics to bar certain activities on the part of a public official and his associates is not tantamount to saying that the activities sought to be prohibited are, prior to the adoption of such code, wrongful per se. In that light, plaintiff's failure to prove his individual defamation and defendant's actual malice are omissions which are fatal to plaintiff's case.

Within the periphery of the new body of case law, we hold, on a balancing of interests, that democratic govern-

ment is best served when citizens, and especially public officials and those who aspire to public office, may freely speak out on questions of public concern, even if thereby some individual be wrongly calumniated (*Sheridan* v. *Crisona*, 14 N Y 2d 108, *supra*; *Spalding* v *Vilas*, 161 U.S. 483, 498; *Matson* v. *Margiotti*, 371 Pa. 188; *Manceri* v. *City of New York*, 12 A D 2d 895). If by reason of such utterances a defendant is immune from liability, he does not lose his immunity when the utterances are passed on to the press for publication in the same text as previously delivered (*Barr* v. *Matteo*, 360 U.S. 564, 574-575; *Mellon* v. *Brewer*, 18 F. 2d 168; *Glass* v. *Ickes*, 117 F. 2d 273).

Accordingly, the order under review, insofar as appealed from and insofar as it denied defendant's cross motion for summary judgment, should be reversed, without costs; such cross motion should be granted, dismissing the complaint; and the appeal, insofar as it relates to the plaintiff's motion to strike out the third defense should be dismissed as moot.

CHRIST, BRENNAN and HOPKINS, JJ., concur with RABIN, J.; BELDOCK, P. J., dissents and votes to affirm the order, with the following memorandum: In my opinion, the decision in *New York Times Co.* v. *Sullivan* (376 U. S. 254) is distinguishable from the case at bar. That case concerned the alleged criticism of the official conduct of a public official. The instant case concerns criticism of a public official's private practice of the law. That the plaintiff here was known by the defendant to be a law partner of the public official, clearly appears from the fact that plaintiff's name was included in the name of the law firm and from the fact that the November 19, 1962 article which appeared in the

Daily Argus, and which was defendant's basis for his October 22, 1963 speech, specifically mentioned plaintiff by name. In my opinion, defendant's speech accuses the Mayor and his law partners of unethical conduct in their practice of law. Therefore, it was sufficient to defeat defendant's cross motion for summary judgment dismissing the complaint.

Order, insofar as appealed from and insofar as it denied defendant's cross motion for summary judgment, reversed, without costs; such cross motion granted and the complaint dismissed, without costs. Appeal, insofar as it relates to the plaintiff's motion to strike out the third defense, dismissed as moot.

APPENDIX E

4. *Pearson* v. *Fairbanks Publishing Co.* (unreported), *aff'd on other grounds* Alaska (1966)

IN THE

SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

DREW PEARSON,
Plaintiff,
—*vs*—
FAIRBANKS PUBLISHING CO., INC. and C. W. SNEDDEN,
Defendants.

No. 10,209

MEMORANDUM OPINION

Warren A. Taylor and Robert A. Parrish, Fairbanks, Alaska, for plaintiff.

Robert J. McNealy, Fairbanks, Alaska, and Henry J. Camarot, Springfield, Oregon, for defendants.

Plaintiff Drew Pearson is and has been at all times pertinent herein the author of an internationally published column entitled the Washington-Merry-Go-Round. Defendants Fairbanks Publishing Co., Inc. and C. W. Snedden are and have been at all times pertinent herein a newspaper printing company and publisher respectively of a Fairbanks newspaper entitled The Daily News Miner. Plaintiff complains in this action that defendants libeled him in two editorials, published July 8 and August 15, 1958, wherein plaintiff was called the "Garbage Man of the Fourth

Estate." The defendants defend principally upon true fact and fair comment. The pertinent Pearson column and the News Miner editorials are set out in the appendix to this opinion.

At the outset of this opinion the Court desires to point up a difference in the respective parties (*sic*) theory as to the controlling factors of the suit. Plaintiff contends that the four corners of the alleged libelous publication alone constitute the yardstick for fact finding; that the words "Garbage Man of the Fourth Estate" are defamatory and libelous per se (supporting presumed substantial damages). Plaintiff then proceeded to adduce proofs that he is a man of good international reputation, that he routed crooks and misfits out of government, sponsored charity projects of large proportion, and generally bent his efforts to effect good will of mankind; that his few errors bore insignificant relation to the thirty odd thousand columns that he had authored, and that generally the designation of "The Garbage Man of the Fourth Estate" could not truthfully or fairly characterize one of such standing, asserting in this regard that such label has grave personal connotation over and above any technical application by the working press.

Defendants on the other hand offer a very broad base for fact finding, asserting and endeavoring to prove that plaintiff is a public figure of international proportion, is a controversial figure, has a reputation among the working press of publishing leftovers and inaccurate material, that he injects himself, however subtly, into local political arenas and did so in the matter at bar, that the word garbage is generally understood as a literary designation of trash and has no personal connotation; and besides, defendants sum

up— "how many garbage pails must a person empty to be called a garbage man".

The foregoing summary is necessarily an over simplification of the extensive matters actually presented during the eight day trial, in which, incidentally, the orderly processing of each side was hopelessly overwhelmed by the accommodation to out of town and out of state witnesses (the plaintiff himself left the Court and the State before the trial was half finished) all of which made evidence relevancy a meaningless phrase and materiality an indefinable term. However shaded in grays most of the propositions appear, certain significant facts can be considered as established:

(1.) There was a political atmosphere in the Territory of Alaska at the times of the plaintiff's column and the defendant's editorial comment. (July-August 1958)

(2.) That plaintiff's column contained political implications of supporting Democrat Ernest Gruening for political office. (See Appendix A)

(3.) That defendant's editorials contained political implications of supporting Republican Mike Stepovich for political office. (See Appendix B)

From the foregoing alone it would be accurate to conclude that at least eventually these two members of the working press, Mr. Pearson and Mr. Snedden, would come to contest. And literary weapons usually include name calling. Apparently the Court is asked to decide not only under rule of privilege who is entitled to the first hurl but also the delicacy (or extravagance) the rule of fair comment dictates. These are not easy decisions.

Appendix E
Pearson v. *Fairbanks Publishing Co.*

I am further disheartened with a growing acceptance of incredulity that once proud and fierce free press advocates should succumb to judicial determination of controversies between themselves. The fact of this lawsuit seems to be the most difficult fact of all to reconcile. It precipitates speculation as to what the plaintiff contended the law was or should be in those many suits wherein he was defendant, (see Defendant Exhibit I, entitled "Confessions of an S.O.B."); interesting however scandulous (*sic*) herein.

What is the law of libel as applied herein? Plaintiff urges *Reynolds* v. *Pegler* 223 F2d 429. Defendant urges *Pauling* v. *News Syndicate Co., Inc.* (No. 301 Sept. term 1963, U. S. Court of Appeals 2nd Circuit). This Court is most strongly attracted to *New York Times* v. *Sullivan* 376 U S 254, 84 S. Ct. 710, 11 L. ed (*sic*) 2d 686 (1963) which contains an amazing collection of authoritative statements concerning libel and the freedom of the press on matters of public concern. A study of this material could scarely leave doubt as to the historical and contemporary attitudes on this subject, as for example in 1794 (pg. 703).

> "In every State, probably in the Union, the press has exerted a freedom of canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of common law. On this footing the freedom of the press has stood; on this foundation it yet stands".

and again later,

> "In the realm of religious faith and in that of political belief, sharp differences arise. In both fields

> the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in the church or state, and even to false statement. But the people of this nation have ordained in the light of history, that in spite of the probability of excesses and abuses these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. (310 U. S. 296)"

While the above historical references had application primarily to public officials, this category has been extended to candidates for public office[1] and this Court finds no reasonable basis to exempt those who presume to speak for such candidates, particularly those public figures of international stature. Restated with facts at bar the plaintiff Drew Pearson, a public figure and internationally known newspaper and radio columnist of no mean proportion, should occupy the same standing in the law of libel as Senator Gruening whose cause he was publicly supporting[2]. There can be little question that candidate Gruening could have been so assailed with impunity.

The foregoing is an application of State and Federal constitutional protection of free speech and press given to the publication. I also hold that the case law, developed

---

[1]See *Bingham* v. *Buckley*—NY 2d—(Sup. Ct. July 30, 1964)

[2]For example as to a candidate see *Phoenix* v. *Choisser*, 82 Ariz. 271, 276, 277, 312 P. 2d 150, 154 (1957), *Coleman* v. *MacLannen* 78 Kans. 711, 98 P. 281 (1908).

prior to the Times case, leads with persuasive logic to the same result.

Turning to the evidence I find that the innuendoes of fact in the editorial are false.[3] However these statements are privileged.

The restatement of torts provides in section 598 that:

> An occasion is conditionally privileged when the circumstances induce a correct or reasonable belief that,
>
> (a) facts exist which affect a sufficiently important public interest, and
>
> (b) the public interest requires the comunication of the defamatory matter to a public officer or private citizen and that such person is authorized or privileged to act if the defamatory matter is true.

The evidence indicates that Mr. Snedden, who caused the offending editorials to be published, honestly believed that Mr. Pearson was inaccurate. The occasion for the first publication has been explained. If Senator Gruening could be attacked, so could one of his outspoken supporters.

As previously mentioned, Mr. Pearson interjected himself into Alaskan politics; his reputation for accurate analysis was accordingly a matter of public concern. The July 8th editorial was related to this area of public con-

---

[3]July 8, 1958. Statements of fact include "almost everything he has said about Alaska has been inaccurate either in whole or in detail". August 15, 1958. "He is careless with the facts". The Court cannot separate these facts from the editorial expression of opinion. The entire editorial suggests that the publisher is presenting his opinion rather than objective findings.

cern as was the August 15th editorial, the latter also citing the reason for dropping the column.

Restatement of torts § 606 (1) applies to public figures:

> (1) Criticism of so much of another's activities as are matters of public concern is privileged if the criticism, although defamatory,
>
> (a) is upon,
>
> (i) a true or privileged statement of fact, or
>
> (ii) upon facts otherwise known or available to the recipient as a member of the public and
>
> (b) represents the actual opinion of the critic, and
>
> (c) is not made solely for purpose of causing harm to the other.

If the phrase "Garbage Man of the Fourth Estate" disparages the private character of the author in the mind of the reader then the rule provides:

> (2) Criticism of the private conduct or character of another who is engaged in the activities of public concern, in so far as his private conduct or character affects his public conduct, is privileged, if the criticism, although defamatory, complies with the requirements of Clauses (a), (b) and (c) of sub-section (1) and, in addition, is one which a man of reasonable intelligence and judgment might make.

Another relevant Restatement of torts right in point is Sect. 610 (3) and comments f and g:

(3) The privilege of criticism stated in § 606 includes criticism of another's participation in public activities.

(f) One who as a citizen or as a representative of some voluntary group or association participates in matters of public concern and importance is subject to criticism and comment which is privileged under the rule stated in § 606. So too, one who by his activities and by written or spoken language attempts to influence public opinion in any way is subject to the free and honest criticism of his efforts by members of the public. Thus, lobbyists and other persons attempting to influence prospective legislation, propagandists seeking public support for their causes, and various persons who participate in civic and state activities, not as office holders or candidates therefor, but merely as private citizens, are subject to the free expression of the opinion of those comentators who honestly but disparagingly pass judgment upon their activities.

(g) A man may, by writing letters or articles for newspapers or magazines, appeal to the public either to expose what he regards as abuses on the part of governmental officials or others or to direct attention to real or supposed grievances of himself, a third person or a class. Under such circumstances, his conduct in making such an appeal is exposed to the judgment of the public, and, having started a newspaper war, he cannot complain if he gets

> the worst of it, so long as the expression of opinion, however disparaging, is honestly given. So too, a critic who attacks a book, play or public institution must expect that his criticism will in turn become the object of counter attacks.

The following are some of the cases that the Court relied on to illustrate the Restatement policy. *Fetens* v. *Sokolsky* 51 N. Y. S. 2d 240 (1944) which held that when a writers (*sic*) work is submitted to the public, caustic criticism is privileged. Such attacks may be fantastic and still privileged. *Berg* v. *Printers Ink,* 54 F Supp 795 (1943). An opinion must however be published in good faith and not for the sole purpose of harming the author. *Parmalee* v. *Hearst Publishing Co.,* 93 N E 2d 512, 515 (1950). To say plaintiff wrote disgusting and depraved books is fair comment; *Reynolds* v. *Pegler* 223 F 2d 429, 433 (1955) (good faith test applied).

Fair comment exists here since there was a legitimate interest in a reporters (*sic*) accuracy and the publication was in part:

> "for the bona fide purpose of giving the public the benefit of comment which it is entitled to have, rather than for any ulterior motive of causing harm to the plaintiff". Prosser on Torts (2nd Ed) pg. 623.

In conclusion, while reasonable men may find this editorial to be false and in bad style, this does not mean it is unfair. It has been held to be no libel to call a newspaper "the most vulgar, ignorant and scurrilous journal ever pub-

lished" *Great Britain Hariot* v. *Stewart,* cited in *Cherry* v. *Des Moines Leader,* 86 N W 323, 325 (Iowa 1901). (A drama critic in describing a performance wrote "Effie is an old jade, Addie a capering monster. . . . Strange creatures with painted faces and hideous mien.["] This was fair comment.)

The defendant's editorial was privileged, and as held by our Supreme Court and the Supreme Court of the United States, the privilege aforementioned is lost only by a showing of actual malice. Plaintiff contends evil motives, ill will and emnity are the only reasonable motivations that could attend the publishing of such otherwise purposeless name calling, not calculable under any stretch of the imagination to correct believed misstatement of fact concerning Gruening and Stepovich; that the use of the term "Garbage Man of the Fourth Estate", imputing as it is contended the lowest form of human endeavors, inherently establishes malice, all, a priori, indelibly impressed by a repeated publication in the same language.

In connection with purposelessness this Court believes it reasonable to infer that to strike down ones lauder is to strike down the lauded and this defeats the conclusiveness of plaintiff's first contention, i.e., there could have been constructive purpose. In connection with the imputation of "Garbage Man of the Fourth Estate" this Court accepts the defendant's definition of garbage as literary trash which definition is both reasonable and accruate, however inappropriate for the purposes sought to be achieved by its use. Such definition hardly supports the contention of inherent malice. The fact of repeating the use of this phrase a month later, while outraging all sense of propriety and pur-

pose, must necessarily be accepted and judged by the same standard and test as the first publication; it also falls short of stripping the privilege the Constitution and common law affords. As a parting comment on this last subject the Court finds, when coupled with the matter of the telegrams, sufficient reason and basis to refuse defendant's request for attorney fees and costs. It may well be that this "one for good measure" constituted such "salt in the wound" as to have precipitated this lawsuit. Accordingly, each party shall bear its own costs and attorney fees.

Let findings of fact and conclusions of law and judgment be drawn by defendant not inconsistent with this opinion.

DATED at Fairbanks, Alaska this 25th day of November, 1964.

EVERETT W. HAPP
Superior Court Judge

Appendix E

"Appendix A" to Opinion in *Rearson* v. *Fairbanks Publishing Co.*

Pearson v. Fairbanks Publishing Co.

Civil Case No. 10,209

The following column appeared in the Fairbanks Daily News Miner—Monday, July 7, 1958

Drew Pearson's WASHINGTON
Merry-go round. . . . .

WASHINGTON—A lot of Johnny-come-latelies such as Gov. Mike Stepovich are now claiming credit for making Alaska the 49th state in the Union. But the man who unobtrusively, but consistently, badgered senators, buttonholed congressmen, maneuvered in the smoke-filled rooms to bring statehood to Alaska is an ex-newspaperman named Ernest Gruening. He more than anyone else is the father of the 49th state.

Gruening first came to Washington in 1933 as chief of insular affairs division of the Interior Department organized under the late great Harold Ickes. As such, he guided the destinies of such American stepchildren as the Virgin Islands, Puerto Rico, Hawaii and Alaska.

Gruening had taken a degree at Harvard Medical School, but spent much of his time as a newspaperman, and was editing the Portland, Maine, Evening Express when he came to Washington to nurse American territories. After battling their causes before Congress, he was made governor of Alaska in 1939, and as such did a revolutionary thing.

He went all over that far flung territory, visiting every Eskimo village, every island in the Aleutians, every backwoods settlement, getting to know the people and their

Appendix E
"Appendix A" to Opinion in *Pearson* v.
Fairbanks Publishing Co.

problems. By a rickety plane, and even by canoe, he toured the northwest territory.

Back in Washington when Congress was in session, he called on congressmen to plead for Alaskan problems. For 14 years, longer than any other man in history, he remained the governor of Alaska. Then when Eisenhower failed to reappoint him in 1953, the people of Alaska elected him unofficial senator and he moved to Washington to undertake a 24-hour-a-day lobbying campaign for the territorys (*sic*) statehood.

Shortly before this, however, a great tragedy struck Ernest Gruening's family which, though it brought grief to him, probably hastened the day when Alaska became the 49th state.

His son, Peter, a correspondent for the United Press, was killed in Australia, and his grief-stricken father more than ever threw all his heart and soul into the battle for Alaskan statehood. In effect he made Alaska his child.

That is the real story of the No. 1 lobbyist for Alaska and how statehoood was achieved.

In some respects the state of Texas probably had most to lose by admission of Alaska as the 49th state. But Sen. Lyndon Johnson put national interest ahead of state interest and worked quietly behind the scenes for Alaska. Without his potent support the bill would have been delayed.

Alaska, with 587,000 square miles against Texas' 267,000, now becomes the biggest state in the Union. California can no longer boast the highest peak in the U. S. A., for Mt. McKinley in Alaska is 6000 feet higher than Mt. Whitney in California. And Yellowstone is no longer the biggest national park. McKinley National Park is the biggest.

Finally, a new crop of Texas jokes will have to be told.

Appendix E

"Appendix B" to Opinion in *Pearson* v. *Fairbanks Publishing Co.*

Pearson v. Fairbanks Publishing Co.

Civil Case No. 10,209

The following editorial appeared in the Fairbanks Daily News Miner—Tuesday, July 8, 1958

GARBAGE MAN OF THE FOURTH ESTATE

Drew Pearson irritates us often. On days like yesterday he infuriates us. It isn't so much because of his opinions, which frequently are so biased they almost tilt out of the page, as it is because his facts are so cockeyed.

In yesterday's Washington-Merry-Go-Round column printed on the News Miner's editorial page, Mr. Pearson credited Ernest Gruening with being "more than any one else the father of the 49th state." This is a matter of opinion. We think Drew Pearson is not in the best of all possible positions to draw such a conclusion. Without wishing in the least to deprecate the fine contribution of former governor Gruening, we feel that the columnist is somewhat off the beam there. That, of course is our opinion.

But in describing the statehood efforts of our former governor—real and imaginary—we think it was wholly unnecessary for Mr. Pearson to start his piece by describing our present governor as a "Johnny-come-lately" and stating that Governor Stepovich is "now claiming credit for making Alaska the 49th state".

Mike Stepovich, born in Fairbanks, can hardly be described accurately as a Johnny-come-lately. He has too much of an understanding of the cooperative endeavor which the gaining of statehood was, and too much to do, to be claiming credit for that accomplishment. To the best of

Appendix E
"Appendix B" to Opinion in *Pearson* v.
Fairbanks Publishing Co.

our knowledge, Mike Stepovich hasn't been claiming a thing.

No one can dispute that Ernest Gruening, over a long period of years, was dedicated to the statehood cause. It is true he threw himself heart and soul into the battle. In fact, he threw himself in on many occasions when it would have served the cause of statehood vastly better for him to have kept himself out.

We are reminded here of a description given by one who is familiar with the Washington scene as Drew Pearson—and immensely more familiar with the details of the Alaska statehood struggle there. This man said, "It's a good thing the people of Alaska sent down two other Tennessee Plan representatives, and had Bob Bartlett on the job, because it has taken practically the full time efforts of three men for the past two years patching up the damage Gruening did."

One word in Mr. Pearson's column about Ernest Gruening sticks out like a sore thumb. The word says he worked "unobtrusively" in Washington. It sticks out because it is so devastatingly inappropriate. If you ever see anybody being unobtrusive, you won't have to ask his name to be sure it is not Ernest Gruening.

It is too bad that Drew Pearson was stimulated to write the things he did about our former governor and our present one, because they are going to hurt Mr. Gruening in Washington and in Alaska, where he is all too well known.

Yesterday's column deepens a doubt we already had in our mind about the usefulness of Drew Pearson on the national scene. Almost every single thing he ever said about

Appendix E

"Appendix B" to Opinion in *Pearson* v. *Fairbanks Publishing Co.*

Alaska has been inaccurate either in whole or in detail. Long before yesterday this raised for us the question of whether he is as irresponsible in all fields and on all subjects as he is in respect to Alaska. If he is, he is doing a distinct dis-service to the American republic, which being a democracy can only function wisely to the extent its citizens are well and fairly informed by the press.

Does Mr. Pearson so inform his readers? Not on matters Alaskan, of our certain knowledge; and not on much of anything else, in the opinion of his Washington colleagues, one of whom the other day described him as "the garbage man of the fourth estate."

This would seem to raise the point—which frankly has bothered us from time to time in the past—of why we should give space in our newspaper to the printing of garbage. We have worried about that. Even though the Washington Merry-Go-Round is the most popular and widely read column sent out from Washington, the question worries us right now.

For the time being we'll get a clothespin for our editorial nose while we decide what to do about this free-wheeling garbage man of the fourth estate.

The following editorial appeared in the Fairbanks Daily News Miner—Friday, August 15, 1965

EXIT DREW PEARSON

For some years the News-Miner has carried the Washington column by Drew Pearson called "Washington Merry-Go-Round". Since Aug. 1 it has not appeared in our paper and several subscribers have telephoned or written to ask what happened to Pearson.

Appendix E

"Appendix B" to Opinion in *Pearson* v. *Fairbanks Publishing Co.*

The Pearson column has been discontinued. This was not an action which we took lightly or without a good deal of thought, as the "Washington Merry-Go-Round["] is undeniably a popular feature in many newspapers.

We have known for a long time that on subjects having to do with Alaska Mr. Pearson has been so inaccurate as to be very disturbing to us. It was not until the publisher of the News-Miner recently spent several months in Washington, however, that the general reputation of this columnist was fully appreciated.

That reputation is summed up in the comment of a member of the working press in the nation's capital that Pearson is "the garbage man of the fourth estate."

Not wishing to distribute garbage with our newspaper, we have dropped Pearson. We will not be parties to publishing what we know to be inaccurate and misleading.

Since the early part of this year, while our publisher and other Alaskans have been in Washington in connection with the statehood bill, they have observed at first hand some of the happenings on which Drew Pearson commented i. his column. We do not mean things connected with statehood, but other events in Washington. We are sorry to have to say that, in our opinion, Pearson's accounts were not very closely related to the real events.

It is not because Mr. Pearson is allegedly "liberal" or "anti-Republican" that we are dropping him. It is just because he is so everlastingly careless with the facts.

Another Washington column, whose writer deals accurately with the great problems of the day in our nation, will soon start in the News-Miner.

APPENDIX E

5. *Brennan* v. *Associated Press (not yet reported)*

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

E. GAYNOR BRENNAN,
Plaintiff,
—*against*—
THE ASSOCIATED PRESS,
Defendant.

Civil Action
No. 7728

Before: HON. LEONARD P. MOORE, *U. S. C. J.**

Appearances:

Philip R. Shiff, New Haven, Connecticut, for the Plaintiff.

Curtiss K. Thompson of Thompson, Weir & Barclay, New Haven, Connecticut (William M. Mack of New Haven, Connecticut, and Arthur Moynihan and Nicholas Vazzana, both of New York, New York, of counsel on the brief), for the Defendant.

MOORE, *Circuit Judge*

This is a libel action arising out of an allegedly defamatory account in a news dispatch of what took place at a public hearing before the liquor control committee of the Connecticut legislature on March 14, 1957.

*Of the Second Circuit, sitting by designation.

Appendix E
Brennan v. *Associated Press*

The plaintiff, E. Gaynor Brennan, was and is a successful lawyer living in Stamford. He had served in both houses of the Connecticut legislature, having been elected to the House in 1933 and to the Senate in 1935 and 1937. In 1939 he had been appointed Chairman of the Liquor Control Commission, in which capacity he served until 1941 or 1942. He had been prominent in the Republican Party of Connecticut, having been chairman of its platform committee in 1938. He had held numerous other positions in the state and municipal governments, including the offices of prosecutor of the City Court of Stamford from 1933 to 1937 and Judge of the same court from 1937 to 1939.

Brennan appeared at the hearing on March 14, 1957 as a representative of the Connecticut Wholesale Liquor Dealers Association. Before appearing, he fully complied with the laws of Connecticut pertaining to such appearances by filing with the Secretary of State the name of his principal and a brief description of the legislation in connection with which he was to appear.

During the course of the Committee hearing, William H. Veale, secretary of the United Temperance Society, addressed the Committee in part as follows:

> "Our program is one of education. We don't try to pull any political pressure upon you. We condemned in 1955 the fact that two members of the law firm of the State Democratic Chairman registered as liquor lobbyists and we're condemning in this assembly that a brother of a Republican county leader in Fairfield is registered as a liquor lobbist."

Veale's remarks were apparently directed towards the plaintiff Brennan, whose brother at the time was County Chairman of the Republican Party in Fairfield County.

Appendix E
Brennan v. *Associated Press*

Brennan spoke next. After identifying the capacity in which he appeared, he said:

> "... I could assure the previous speaker that as a counsel and member of the bar, I am certainly aware of the ethics of my profession and know that I would not appear here if any member of my family were a member of the General Assembly. I would feel disqualified. My position with the Connecticut Wholesale Liquor Dealers Association is on a contract to see that they obey the law. I resent the remarks of the last speaker and I condemn his ignorance."

A representative of the defendant, The Associated Press (AP), a New York corporation with its principal place of business in New York, was present at the hearing. He subsequently prepared a news dispatch describing the hearing, for publication in defendant's member papers on the morning of March 15, 1957. Plaintiff does not claim that this dispatch, which is set forth as Appendix A to this opinion, is libelous of him.

On the night of March 14-15, 1957, the original dispatch was rewritten in defendant's New Haven office for publication in defendant's member papers in Connecticut on the afternoon of March 15. Defendant's rewrite editor did not know Brennan personally, though he may have read about him in Connecticut newspapers in the brief period since the rewrite editor moved to defendant's New Haven office from defendant's New York office in January 1957. The purpose of the rewrite editor was to give the original

dispatch a new freshness, so that the afternoon papers would not be running word for word the same story that had appeared in the morning papers. The rewritten story is reproduced as Appendix B to this opinion.

The principal change made by the rewrite editor was in the lead paragraph. Instead of describing the interchange between Veale and Brennan as a clash "on the issue of whether there is a tie-up between political leaders and the liquor industry," as the original dispatch had done, the rewrite began:

> "A charge of illicit lobbying was hurled at a lawyer for the Connecticut Wholesale Liquor Dealers Assn. at a state capitol public hearing yesterday."

It is this lead paragraph, published in the afternoon editions of five Connecticut newspapers with an aggregate circulation of approximately 103,000, which underlies the present suit.

Brennan never asked AP to retract or correct the rewrite. Instead, he brought suit against AP in the Fairfield County Superior Court on February 25, 1959, nearly two years after the publication of the rewrite. The action was subsequently removed to this court upon petition by the defendant.

The essence of the complaint is that the rewrite was false and malicious, in that no one ever accused Brennan of "illicit lobbying" at the hearing. In his original complaint, Brennan alleged that "his practice of law has diminished, whereby he has sustained heavy pecuniary loss," and that "he has been irreparably injured in his profession as a practising attorney." Both allegations were withdrawn

by subsequent amendments. No actual damages were alleged in the complaint as amended for trial, and none were proven at trial.

Plaintiff maintains that he can recover without proof of actual damages, on the grounds that the rewritten story was libelous per se, both because it indicated falsely that he had been accused of a crime involving moral turpitude and because it tended to injure him in the practice of his profession as a lawyer. Brennan relies for the first proposition on two Connecticut criminal statutes which make certain kinds of lobbying illegal, and which provide for fines and imprisonment (up to one year under one statute; up to five years, under the other), in case of violation. Conn. Gen. Stat. § 2-45 (1958); § 53-150 (1958). See also Conn. Gen. Stat. § 53-152 (1958). For his second proposition, Brennan relies on Canon 26 of the Connecticut Canons of Professional Ethics, which indicates that certain kinds of lobbying by an attorney are "unprofessional" and would be grounds for disbarment.

Had AP made the charge that Brennan was an "illicit lobbyist", without qualification, the various dictionary synonyms probably would not have saved the words from being libelous per se. The reading public would more than likely attribute the connotation of "illegal" to "illicit" rather than "unauthorized" or "improper". However, these two words cannot be taken out of the entire article, divorced from it and made the sole foundation of a liability claim. Although Veale did not at any time call Brennan an "illicit lobbyist", the article in its entirety makes it abundantly clear what Veale was condemning in Brennan's appearance before the Committee, namely, the fact that Brennan and a political leader were brothers.

Appendix E
Brennan v. *Associated Press*

There was nothing in Veale's remarks, as quoted at length in the AP story, from which it could be inferred that Brennan had failed to register as a lobbyist, had violated any provision of the lobbying laws or had offended against any canon of professional ethics. Veale's sole criticism as revealed by the article was limited to the brotherly relationship. Brennan, as an experienced and skillful lawyer, could hardly have thought that "as a result thereof that plaintiff [he] was subject to criminal prosecution and disbarment proceedings." There was no suggestion of any such consequence in the article and no proof of even such a possibility produced upon the trial.

Whether a given statement is defamatory or not often turns on the context of the statement. To call a merchant a "crook", without qualification, might well be slanderous per se, because the imputation of dishonesty would tend to injure him in the practice of his livelihood. But to say that a merchant is a crook, because he owes money, is not slanderous per se, since "the appellation is explained away by a specification which does not support the charge." *Herman* v. *Post*, 98 Conn. 792, 793-94, 120 Atl. 606 (1923). See *Yakavicze* v. *Valentukevicious*, 84 Conn. 350, 353-54, 80 Atl. 94, 95-96 (1911). The same principle applies equally to libel:

> "The whole of the reported article must be considered in determining whether it is actionable and whether it transcends a substantially true statement of the facts."

Rose v. *Indianapolis Newspapers, Inc.*, 213 F. 2d 227, 229 (7th Cir. 1954). See also *Schy* v. *Hearst Publ. Co.*, 205 F. 2d 750, 752 (7th Cir. 1953); *Dorney* v. *Dairymen's League*

Co-op Ass'n., 149 F. Supp. 615, 619 (D. N. J. 1957); *Paris* v. *New York Times Co.*, 170 Misc. 215, 9 N. Y. S. 2d 689 (Sup. Ct. 1939), *affirmed without opinion*, 259 App. Div. 1007, 21 N. Y. S. 2d 512 (1940); *Restatement*, Torts § 563, comment *d* (1938).

Here, as in *Herman* v. *Post* and *Paris* v. *New York Times Co., supra*, the context clarifies and removes any misapprehension which might have been caused by the initial statement, so that there is no defamation per se. This being so, the absence of any allegation or proof of actual damages is fatal to the plaintiff's case under general principles of the law of defamation. See *Proto* v. *Bridgeport Herald Corp.*, 136 Conn. 557, 72 A. 2d 820 (1950).

Even if Brennan had been able to demonstrate the existence of libel per se, Conn. Gen. Stat. 52-237 (1958) permits the plaintiff in a libel action to recover only "such actual damage as he may have specially alleged and proved" unless the plaintiff proves either "malice in fact" on the part of the defendant, or failure by the defendant to withdraw the libelous charge upon plaintiff's timely request. Since the plaintiff here did not request a retraction of the statement complained of, and since he neither pleaded nor proved special damages, he can recover only upon proof of malice in fact. *Sandora* v. *Times Co., supra; Wynne* v. *Parsons*, 57 Conn. 73, 17 Atl. 362 (1888).

> "This expression 'malice in fact,' however, does not necessarily mean hatred, spite or ill-will against the plaintiffs, but that there must have been some improper or unjustifiable motive in publishing the article. The defendant must have been actuated from some other motive than a bona fide intention

> of printing an article merely as news in which it believed the public was interested. It is not for the defendant to establish any want of such improper motive on his part. The burden is upon the plaintiffs to establish by a fair preponderance of the evidence such improper or unjustifiable motive on the part of the defendant, ..."

Sandora v. *Times Co.*, 113 Conn. 574, 580, 155 Atl. 819, 822; see *Proto* v. *Bridgeport Herald Corp., supra.*

Upon all the facts and appropriate inferences therefrom, I find that the plaintiff has not sustained his burden of proving that the defendant acted for "some improper or unjustifiable motive." The purpose of defendant's rewrite editor was to give the story a new freshness for the afternoon papers. This purpose may be contrasted with the purpose of the defendants in *Hogan* v. *New York Times Co.*, 313 F. 2d 354 (2d Cir. 1963) (purpose to ridicule plaintiffs for the entertainment of the public); *Proto* v. *Bridgeport Herald Corp.*, 136 Conn. 557, 72 A. 2d 820 (1950) (apparent intent to ridicule plaintiff); and *Wynne* v. *Parsons*, 57 Conn. 73, 17 Atl. 362 (1888) (purpose "to incite the plaintiff to pay [a] claim, and to amuse the public").

The rewrite editor may well have been careless in his choice of words in rewriting the story. "Improper lobbying" would have been a fair characterization of Veale's charges against the plaintiff; "illicit lobbying" was not. But this carelessness did not rise to the level of a reckless indifference to truth or falsity, sufficient to show malice or abuse of privilege. See *Charles Parker Co.* v. *Silver City Crystal Co.*, 142 Conn. 605, 116 A. 2d 440 (1955). This is

not a case in which a newspaper printed a story without making adequate inquiry of eye-witnesses, as was true in *Hogan* v. *New York Times Co., supra,* and *Corsello* v. *Emerson Bros.,* 106 Conn. 127, 137 Atl. 390 (1927). The rewrite was based on an eyewitness account: that of the writer of the original dispatch. As a result, there would have been little or no point in checking the story out with Veale or with the plaintiff. The only negligence on the part of the defendant was in Bender's choice of the word "illicit", and this choice was not so inaccurate as to be reckless.

Similarly, the plaintiff has not proven actual malice within the meaning of *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), which held that the Constitution:

> prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

376 U. S. at 279-80.

A preliminary problem under the *Times* case is whether the plaintiff is sufficiently akin to a "public official" so that he cannot recover without proof of actual malice. This question may be definitively answered when the Supreme Court decides *Rosenblatt* v. *Baer,* 106 N. H. 26, 203 A. 2d 723 (1964), *cert. granted,* 380 U. S. 941 (1965). However, such cases as have now been decided under *Times* suggest that the defendant may invoke the protection of the *Times* rule. Judge Friendly in *Pauling* v. *News Syndicate Co.,* 335

Appendix E
Brennan v. *Associated Press*

F. 2d 659, 671 (2d Cir. 1964), *cert. denied,* 379 U. S. 968 (1965), indicated that it would be easy to extend the *Times* privilege from attacks on public officials to attacks on candidates for public office and thence to participants in public debate on issues of grave public concern. In *Gilberg* v. *Goffi,* 21 App. Div. 2d 517, 251 N. Y. S. 2d 823 (2d Dep't 1964), *aff'd without opinion,* 15 N. Y. 2d 1023, 260 N. Y. S. 2d 29 (1965), a New York court held within the scope of the *Times* rule a lawyer in practice with a town mayor, where the allegedly defamatory statement charged that the mayor's law firm was practising in the town under circumstances showing a conflict of interest. Another New York court has held that a police lieutenant charged with needlessly killing a colored boy in a case which attracted widespread public attention was a "public official," and therefore had to prove actual malice before he could recover for libel. *Gilligan* v. *King,* 34 U. S. L. Week 2243 (N. Y. Sup. Ct. Oct. 29, 1965). In *Walker* v. *Courier-Journal,* 34 U. S. L. Week 2176 (Sep. 23, 1965), the District Court for the Western District of Kentucky held that General Edwin A. Walker, who had gone to the University of Mississippi during racial disorders there after making public appeals for support, became sufficiently a public figure so that he could recover for inaccurate reporting of his activities there only upon proof of actual malice. See also *Nusbaum* v. *Newark Morning Ledger Co.,* 86 N. J. Super. 132, 206 A. 2d 185 (1965) (raising but not deciding the issue whether a private witness who had voluntarily appeared before a congressional subcommittee investigating a matter of public concern could recover for inaccurate reporting of events related to that investigation without proof of actual malice). But see *Fignole* v.

Appendix E
Brennan v. *Associated Press*

Curtis Publishing Co., 34 U. S. Law Week 2297 (S. D. N. Y. Nov. 23, 1965) (*Times* rule does not apply to Haitian politician); *Clark* v. *Pearson*, 34 U. S. L. Week 2338 (D. D. C. Dec. 20, 1965) (lobbyist need not prove malice in libel action against columnist).

The Supreme Court in the *Times* case stressed "the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." 376 U. S. at 270. The public interest in full and free reporting of the activities of lobbyists need not be belabored. The plaintiff had gone before the state legislature as a paid representative of a group who would be affected by proposed legislation in order to voice the opinion of that group as to the proposed legislation. There is no question as to the legality of the plaintiff's conduct. Enlightened law-making can result only from a full presentation of the views of all interested parties. But there is a strong public interest which requires that this presentation of views be freely reported, to minimize the danger of clandestine influence, and to inform the public of this important stage of the legislative process. To paraphrase the *Times* opinion, a rule compelling the reporter of legislative hearings to guarantee the truth of all his assertions upon pain of libel judgments would deter the making of honest characterizations of lobbying activity which the public had a right to hear. A description of the behavior of lobbyists at a legislative hearing, in short, is qualitatively different from descriptions of activities not closely related to government, which classification, if inaccurate, may serve as the basis for damage recovery without proof of actual malice. See *Butts v. Curtis Publishing Co.*, 242 F. Supp. 390 (N. D.

Ga. 1964) (football coach at state university held not a public officer); *Faulk v. AWARE, Inc.*, 14 N. Y. 2d 954, 253 N. Y. S. 2d 990 (1964), *cert. denied*, 380 U. S. 916 (1965) (radio and television performer held not a public officer under the *Times* case).

As we have seen, the rewrite editor's choice of words may well have been careless. But as the Supreme Court said in *Garrison v. Louisiana*, 379 U. S. 64, 79 (1964), "the test . . . laid down in New York Times is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth." The *Times* case itself tells us that proof of malice must be made "with convincing clarity." 376 U. S. at 285-86 (1964). Such proof is lacking here. Defendant's rewriter intended to freshen the original story for the afternoon papers; and if he erred in his nocturnal zeal, and unjustly cast aspersions on the plaintiff, his error was not of the magnitude to serve as the basis for the recovery of damages.

Judgment for the defendant. The findings of fact and conclusions of law appearing herein shall constitute the findings and conclusions as required by Rule 52(a) of the Rules of Civil Procedure.

APPENDIX F

Libel Suits Brought by General Walker Arising Out Of News Reports Identical Or Similar To Reports Here Complained Of

Name of case	Court in which filed and docket number	Damages demanded in complaint
I. Cases Naming Associated Press as a Defendant		
Walker v. The Associated Press	District Court, Tarrant County, Texas, No. 16624	$2,000,000
Walker v. The Associated Press	Circuit Court of Duval County, Florida, Civil Action No. 64-246-L; removed to U. S. District Court, Middle District of Florida, No. 64-267-Civil-J	$2,000,000
Walker v. The Associated Press	Circuit Court of Pulaski County, Arkansas, No. 58859; removed to U. S. District Court, Eastern District of Arkansas, No. LR-65-C-178	$1,000,000
Walker v. Associated Press and Times-Picayune Publishing Corporation	District Court, Caddo Parish, Louisiana, Number 160,536	$2,250,000
Walker v. The Denver Post, Inc. and The Associated Press	District Court, City and County of Denver, Colorado, Civ. No. B66072	$1,000,000
Walker v. The Kansas City Star Company and The Associated Press	Circuit Court, Jackson County, Missouri, No. 133,768	$1,000,000
Walker v. Savell and The Associated Press*	Circuit Court, Lafayette County, Mississippi, No. 7137; removed to U. S. District Court, Northern District of Mississippi, No. W-C-34-62	$2,000,000

*Subsequently dismissed as to Associated Press for lack of jurisdiction.

Appendix F

Name of case	Court in which filed and docket number	Damages demanded in complaint
II CASES NOT NAMING ASSOCIATED PRESS AS A DEFENDANT		
Walker v. Courier-Journal and Louisville Times Company, Inc. and WHAS, Inc.	U. S. District Court, Western District of Kentucky, Civil Action 4639	$2,000,000
Walker v. Times Publishing Company	Circuit Court, Pinellas County, Florida, No. 17,694-L	$2,000,000
Walker v. The Pulitzer Publishing Company	U. S. District Court, Eastern District of Missouri, Eastern Division, No. 63 C 361(1)	$2,000,000
Walker v. Atlanta Newspapers, Inc. and Ralph McGill	U. S. District Court, Northern District of Georgia, Civ. No. 8590	$10,000,000
Walker v. The Journal Company	U. S. District Court, Eastern District of Wisconsin, Civ. No. 64-C-270	$2,000,000
Walker v. The Journal Company	U. S. District Court, Eastern District of Wisconsin, Civ. No. 64-C-276	$2,000,000
Walker v. The Gazette Publishing Company, Inc.	Circuit Court, Pulaski County, Arkansas, Civ. No. 58857	$1,000,000
Walker v. Arkansas Democrat Company	Circuit Court, Pulaski County, Arkansas, Civil No. 58858	$1,000,000
	Total	$33,250,000